

# LEGISLATING TO SAFEGUARD THE FREE AND OPEN INTERNET

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## HEARING BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY OF THE COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

MARCH 12, 2019

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# LEGISLATING TO SAFEGUARD THE FREE AND OPEN INTERNET

TUESDAY, MARCH 12, 2019

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY,  
COMMITTEE ON ENERGY AND COMMERCE,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 11:00 a.m., in room 2322 Rayburn House Office Building, Hon. Mike Doyle (chairman of the subcommittee) presiding.

Members present: Representatives Doyle, McNerney, Clarke, Loeb sack, Veasey, McEachin, Soto, O'Halleran, Eshoo, DeGette, Butterfield, Matsui, Welch, Luján, Schrader, Cárdenas, Dingell, Pallone (ex officio), Latta (subcommittee ranking member), Shimkus, Olson, Bilirakis, Long, Flores, Brooks, Walberg, Gianforte, and Walden (ex officio).

Also Present: Representative Rodgers.

Staff present: AJ Brown, Counsel; Jeffrey C. Carroll, Staff Director; Jennifer Epperson, FCC Detailee; Evan Gilbert, Press Assistant; Waverly Gordon, Deputy Chief Counsel; Tiffany Guarascio, Deputy Staff Director; Alex Hoehn-Saric, Chief Counsel, Communications and Technology; Jerry Leverich, Counsel; Dan Miller, Policy Analyst; Phil Murphy, Policy Coordinator; Kaitlyn Peel, Digital Director; Chloe Rodriguez, Policy Analyst; Mike Bloomquist, Minority Staff Director; Robin Colwell, Minority Chief Counsel, Communications and Technology; Jordan Davis, Minority Senior Advisor; Kristine Fargotstein, Minority Detailee, Communications and Technology; Margaret Tucker Fogarty, Minority Staff Assistant; Peter Kielty, Minority General Counsel; and Tim Kurth, Minority Deputy Chief Counsel, Communications and Technology.

Mr. DOYLE. The Subcommittee on Communications and Technology will now come to order and the Chair recognizes himself for 5 minutes for an opening statement.

## OPENING STATEMENT OF HON. MIKE DOYLE, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

I am very pleased to welcome everyone to the Subcommittee on Communication and Technology's first legislative hearing of this new Congress.

Today, we will be discussing the Save the Internet Act, which I introduced last week along with 132 of our colleagues here in the House.

First, this legislation would restore popular, bipartisan, common sense net neutrality protections and put a cop back on the beat to protect consumers, small businesses, and competitors from unjust and unreasonable practices by internet service providers.

Second, this bill would give the FCC the authority to protect consumers now and in the future through forward-looking regulatory authority.

Third, this bill would restore the commission's legal authority to support broadband access and deployment programs through the Universal Service Fund. These programs pay for the deployment of broadband in rural communities through the Connect America Fund and support access to working families, seniors, and veterans through the Lifeline program.

The Save the Internet Act would enact permanent, effective net neutrality protections into law by codifying the FCC's 2015 Open Internet Order as a new free-standing section of law. That would ensure the internet remains an open platform for innovation and competition, regardless of political changes at the FCC.

By authorizing the order as a free-standing part of the U.S. Code, this legislation also permanently prevents the FCC from applying 27 sections of Title II of the Communications Act as well as over 700 regulations, which is the majority of Title II, to internet service providers.

The bill also permanently prohibits the FCC from engaging in rate regulation or requiring broadband providers unbundle their network.

Last but not least, the Save the Internet Act restores the commission's ability to police unjust and unreasonable practices by ISPs. The approach that we are discussing here today charts a new course for net neutrality and puts in place 21st century rules for a 21st century internet.

In doing so we remove much of the regulatory overhang of Title II that ISPs and our colleagues on the other side of the aisle have long complained about.

Opponents of this legislation need to explain to their constituents which unjust and unreasonable practices they want ISPs to engage in and why they want to allow such practices.

Americans, broadly and overwhelmingly, support these rules. Polls have shown that 88 percent of Republicans, Independents, and Democrats support restoring strong net neutrality protections.

This bill is a new approach and an open invitation to our colleagues and ISPs alike to come together and support a new way forward, because a free and open internet is critical for so many communities and sectors of our economy and because broadband connectivity touches almost every aspect of our economy, politics, and culture.

I encourage my colleagues on the other side of the aisle to seriously consider this legislation. Whether you are a rural broadband provider based in Idaho, like Mr. Green's company, Fatbeam, or you are working to ensure that minority and underrepresented voices get heard online, like Ms. Ochillo's organization, or you have heard from millions of constituents who have called or emailed their elected representatives, the message the people are sending us is clear.

We need to restore strong net neutrality rules and that is exactly what this bill does. Together, we hope to advance this legislation through the Congress and restore these essential protections for all Americans.

I would also like to remind my friends and particularly my friends on the other side of the aisle that this is the bill that is before the committee today and this is the issue we are discussing.

I am happy to talk to Members about other issues at the appropriate time for them to be brought before the subcommittee. But for today, this bill is the subject of our discussion.

[The prepared statement of Mr. Doyle follows:]

#### PREPARED STATEMENT OF HON. MIKE DOYLE

I am very pleased to welcome everyone to the Subcommittee on Communication and Technology's first legislative hearing of this new Congress.

Today, we will be discussing the Save the Net Act, which I introduced last week along with 132 of our colleagues here in the House.

This legislation would restore popular, bipartisan, common sense net neutrality protections—and put a cop back on the beat to protect consumers, small businesses, and competitors from unjust and unreasonable practices by Internet Service Providers.

In addition, this bill would give the FCC the authority to protect consumers now and in the future through forward-looking regulatory authority.

Finally, the bill would restore the commission's legal authority to support broadband access and deployment programs through the Universal Service Fund.

These programs pay for the deployment of broadband in rural communities through the Connect America Fund—and support access to working families, seniors, and veterans through the Lifeline program.

The Save the Internet Act would enact permanent, effective Net Neutrality protections into law by codifying the FCC's 2015 Open Internet Order as a new free-standing section in the U.S. Code.

That would ensure the internet remains an open platform for innovation and competition, regardless of political changes at the FCC.

By authorizing the order as a free-standing part of the U.S. Code, this legislation also permanently prevents the FCC from applying 27 sections of the Communications Act as well as over 700 regulations, the majority of Title 2, to Internet Service Providers.

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The approach that we're discussing here today charts a new course for Net Neutrality, and puts in place 21st Century rules for a 21st Century internet.

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I'm happy to talk to Members about other issues and the appropriate time for them to be brought before the subcommittee, but for today this bill is the subject of our discussion.

And with that, 29 seconds remaining, I would now like to represent my friend and colleague, Mr. Latta, the ranking member of the subcommittee, for 5 minutes for his opening statement.

**OPENING STATEMENT OF HON. ROBERT E. LATTA, A  
REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO**

Mr. LATTA. Well, thank you very much, Mr. Chairman, and good morning to our witnesses for being with us today. I am glad you are here.

I am always happy to be here with my colleagues and learn more from the real experts on important issues in the telecom space. I have to admit I am confused why we need to spend another entire hearing on net neutrality less than a month after talking about the same thing.

In the meantime, the majority has introduced essentially the same bill that has already failed to garner the support of their entire caucus as a CRA in the last Congress.

Make no mistake, there are a lot of different ways for Congress to go about protecting consumers with permanent net neutrality rules.

For example, the bill I introduced last month is based on Chairman Waxman's approach in 2010 and my colleagues, Republican Leader Walden and Mrs. Rodgers, offered two more bills based on the rules from FCC's 2015 order and Washington State's bipartisan legislation of 2018.

These bills all originated from Democratic net neutrality proposals or laws. Anyone interested in a bipartisan legislative solution would consider each of them to be a reasonable starting point for real discussion.

In contrast, the majority came to that hearing with no ideas. Since that time, we have not heard a word from them until they were ready to announce yet another net neutrality hearing.

Worst of all, instead of engaging with us to try to solve the problem, my colleagues have retrenched back to the most extreme position in this debate.

The idea that only Title II is real net neutrality is dangerous and wrong. Those who are newer to the subcommittee or to this debate should not be fooled.

You have heard over and over again that we need to protect consumers from blocking, throttling, and internet fast lanes, which sounds reasonable enough.

Well, we can easily do all of these—of this without giving the Government free rein over the internet through the specter of Title II.

Everyone who has followed this net neutrality debate or on even the most superficial level is aware that Title II is a nonstarter with Republicans, and even with some Democrats. It has no chance of even passing the Senate or being signed into law.

Yet, here we are, in a repetitive hearing followed by a string of partisan victories that will simply ensure that anyone—if that anyone digs in further and nothing meaningful ever gets done to protect consumers.

Even if there were a chance that the majority's Title II bill would become law, we now know unequivocally that it would be the wrong direction for rural America.

As we heard from Mr. Franell at the last hearing and from countless other rural carriers as well, Title II was a devastatingly investment killer for small ISPs who need to be expanding to serve more of our constituents of rural America.

At that hearing, so many Members on both sides of the aisle engaged Mr. Franell with questions and concerns about this impact. There seemed to be an overwhelming bipartisan interest in working to close the digital divide and get modern broadband service out to the communities that are being left behind.

So, why aren't we spending our time working together on that instead of putting the crushing regulatory regime of Title II back onto the folks we need to be out there investing and expanding? It makes no sense.

I look forward to hearing from our witnesses today and with that, Mr. Chairman, I yield back the balance of my time.

[The prepared statement of Mr. Latta follow:]

#### PREPARED STATEMENT OF HON. ROBERT E. LATTA

Good morning and welcome to our panel of witnesses. While I am always happy to be here with my colleagues to learn more from the real experts on important issues in the telecom space, I have to admit I'm confused why we need to spend another entire hearing on net neutrality less than a month after talking about the same thing.

In the meantime, the majority has introduced essentially the same bill that has already failed to garner the support of their entire caucus as a CRA in the last Congress. Make no mistake, there are a lot of different ways for Congress to go about protecting consumers with permanent net neutrality rules. For example, the bill I introduced last month is based on Chairman Waxman's approach in 2010 and my colleagues, Republican Leader Walden and Mrs. Rodgers, offered two more bills based on the rules from the FCC's 2015 order and Washington State's bipartisan legislation from 2018. These bills all originated from Democratic net neutrality proposals or laws. Anyone interested in a bipartisan legislative solution would consider each of them to be a reasonable starting point for a real discussion.

In contrast, the majority came to that hearing with no new ideas. Since that time, we have not heard a word from them until they were ready to announce yet another net neutrality hearing. Worst of all, instead of engaging with us to try to solve the problem, my colleagues have retrenched back to the most extreme position in this debate.

The idea that only Title II is "real" net neutrality is dangerous and wrong. Those who are newer to this subcommittee or to this debate should not be fooled. You have heard over and over again that we need to protect consumers from blocking, throttling, and internet "fast lanes," which sounds reasonable enough. Well, we can easily do all of this without giving the Government free rein over the internet through the specter of Title II.

Everyone who has followed this net neutrality debate on even the most superficial level is aware that Title II is a nonstarter with Republicans, and even with some Democrats. It has no chance of ever passing the Senate or being signed by the President. Yet here we are in a repetitive hearing followed by a string of partisan vic-

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I look forward to hearing from our witnesses, and with that I yield back.

Mr. DOYLE. The gentleman yields back.

**OPENING STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY**

The Chair now recognizes Mr. Pallone, chairman of the full committee, for 5 minutes for his opening statement.

Mr. PALLONE. Thank you, Chairman Doyle.

Words like net neutrality and open internet don't capture how central this issue is for our society. We are talking about what the country stands for.

We are talking about saving economic opportunity and innovation, saving our kids' educational opportunities, and saving our democracy, and it is that important.

Without net neutrality, a free and open internet simply does not exist. We have all heard the fears of our constituents. In my district, small businesses like Rock Star Bakery and Second Life Bikes in Asbury Park are concerned that without net neutrality their businesses could be blocked from reaching their customers.

They worry large corporations could buy "fast lanes," which would make their businesses less competitive. Conservatives and liberals alike worry about their voices being shut down by corporations that don't agree with their point of view, and without access to a free and open internet, my constituents are worried it would be harder to find a job, harder to get the training they need, and harder for their kids to keep up at school.

After all, today, people need the internet to find good-paying jobs and to prepare their children to succeed in life. A free and open internet isn't just about making sure that we can watch videos on our computers or on our phones.

It is much more than that. It is about protecting free speech, commerce, creativity, and innovation, and that is why it is sad that we even have to hold this hearing on legislating to safeguard the internet.

The FCC's order in 2015 established strong net neutrality rules and that was upheld twice in Federal court. The debate about net neutrality was over. Consumers and small businesses were protected.

But the Trump FCC defied the American people and rolled back those common-sense protections. It didn't matter that polling showed that 86 percent of Americans supported these protections,



nor did it matter that a historic 24 million people commented on their action, and the overwhelming majority in opposition.

And that is why this committee must act. The Save the Internet Act will restore the meaningful net neutrality protections Americans want. It will stop this FCC or a future FCC from undermining free speech, small businesses, and consumers, and we must act swiftly.

There is no time for delay. Without net neutrality, we are already seeing the slow march of anti-consumer behavior. ISPs are charging internet users more for using their smart phones' internet connection on another device. In other instances, they are charging consumers more for watching high-definition videos. And that is not what a free and open internet looks like.

So that is why I am very happy that so many of my colleagues have joined with Chairman Doyle in signing on as original cosponsors of this legislation. After unveiling the Save the Internet Act last Wednesday, the bill was introduced with 132 original cosponsors.

And the Save the Internet Act will bring back the FCC's commonplace bedrock principles. It will put a cop on the beat at the FCC and protect Americans and small businesses from abusive and discriminatory network practices.

Mr. PALLONE. And with that, I would like to yield one minute to the vice chair of our subcommittee, the gentlewoman from California, Ms. Matsui, whatever time she may consume.

[The prepared statement of Mr. Pallone follows:]

#### PREPARED STATEMENT OF HON. FRANK PALLONE, JR.

Words like "net neutrality" and "open internet" don't capture how central this issue is for our society. We are talking about what the country stands for. We are talking about saving economic opportunity and innovation, saving our kid's educational opportunities, and saving our democracy. It is that important. Without net neutrality—a free and open internet simply does not exist.

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And without access to a free and open internet, my constituents are worried it would be harder to find a job, harder to get the training they need, and harder for their kids to keep up at school. After all, today, people need the internet to find good paying jobs and to prepare their children to succeed in life.

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The Save the Internet Act will bring back the FCC's commonplace, bedrock principles. It will put a cop on the beat at the FCC and protect Americans and small businesses from abusive and discriminatory network practices.

With that, I yield one minute to the vice chair of the subcommittee Ms. Matsui.

Ms. MATSUI. Thank you, Chairman Pallone.

As you know, paid prioritization has been a priority of mine for several years and I think we all agree that calls terminating at public safety answering points shouldn't be dropped and various content delivery systems and network traffic operations have become important parts of the internet ecosystem that can improve the consumer experience.

The core issue here is ensuring consumers don't have to pay more for the same products and services online and it doesn't take a technologist to know when you are getting a bad deal.

I am mindful of the potential use cases that next-generation networks can facilitate and I previously introduced legislation to ensure that allowing all consumers to access content equally remains at the center of the important debate on the service requirements and consumer benefits of our open internet policies.

I am very pleased that we are having this hearing and I feel it is very, very necessary. We need a free and open internet and hearings like this are very necessary.

Thank you, and I yield back.

Mr. DOYLE. The gentlelady yields back.

Does the gentleman yield back his time?

Mr. PALLONE. Yes, I do. Thank you.

Mr. DOYLE. The gentleman yields back.

The Chair now recognizes Mr. Walden, the ranking member of the full committee, for 5 minutes for his opening statement.

**OPENING STATEMENT OF HON. GREG WALDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON**

Mr. WALDEN. Good morning, Mr. Chairman.

Mr. DOYLE. Good morning.

Mr. WALDEN. Thank you for having this hearing.

Before I start, I just have a question for the Chair. Does 18 U.S.C. Section 1001 involving false statements to Congress apply to witnesses who testify here even if they don't stand up and swear in?

Mr. DOYLE. It does.

Mr. WALDEN. OK. Thank you.

I want to thank our witnesses, especially our sole Republican witness. Mr. McDowell, it is always good to have you before the committee.

A permanent legislative solution produced in good faith with our Democratic colleagues is the only way to protect consumers, innovation, and an open internet.

I have repeatedly called for an end to this ridiculous partisan back and forth. It is time for bipartisan legislation that could actually become law and I think we could find common ground as this committee has a history of doing.

Yet, even after offering a menu of bipartisan legislative proposals at our hearing last month to preserve an open internet once and for all, unfortunately, my friends on the other side have not decided to work with us on a bipartisan solution and I am really disappointed.

The partisan approach is not the answer. It will not become law. Title II is not necessary to preserve a free and open internet. We could permanently ban blocking, we could permanently ban throttling, and Ms. Matsui's concerns—we could permanently ban paid prioritization without the heavy-handed approach of Title II.

We heard last month about the regulatory impact of Title II on rural broadband deployment from a small internet service provider, Mr. Joe Franell of Eastern Oregon Telecom. Indeed, he is from my district in eastern Oregon and across rural America it is where we rely on small ISPs like Eastern Oregon Telecom to help connect our communities with high-speed internet.

In an opinion piece in the East Oregonian that is running this morning, Joe wrote that the heavy hand of Title II, “shifted Eastern Oregon Telecom’s focus from our consumers to regulatory interference and the draining cost of reporting and compliance,” closed quote.

Joe went on to say that every dollar he spends on reporting to regulatory agencies is a dollar not spent on serving rural Oregon.

Frankly, Title II could provide the Federal Government near unlimited and unchecked authority to regulate and tax—regulate and tax—the internet. It is not an internet that protects consumers nor is that an internet that would allow for American ingenuity to thrive. I think we could do better.

I would also like to take note that the internet seems to be working today, despite all the hyperbolic rhetoric to the contrary last year. So what internet crisis brings us to the hearing room today?

It is certainly not the abuses by the tech platforms that occupy the news every day, not the limiting of conservative voices on social media, shadow banning and throttling and things of that nature, not the seeming inability to curb harmful and illicit behavior online, not how tech companies make their deals to prioritize internet traffic on the off ramps, not their own agreements on sharing the people's personal information.

No, that is not what brings us here today. What brings us here is that Speaker Pelosi still believes broadband providers are the real threat and so I assume, directed the majority would move this bill.

The internet of today grew dramatically with little or no Government interference. Saddling it now with an archaic regulation from the 1930's monopoly-era copper land-line phone company seems like an odd way to spur investment and innovation.

Meanwhile, big tech companies want complete freedom not just from regulation but also from liability for facilitating all sorts of harmful and illicit activity.

Twenty years ago, Republican Congress and a Democratic president granted special liability limitations to help the tech sector to flourish.

This is Section 230 of the Telecom Act of 1996 and, without objection, this bipartisan agreement accomplished its primary objective. Online platforms are now major venues for communication and commerce and not just in the United States but around the world.

But Section 230 was also supposed to be about responsibility. With a liability limitation in their back pocket, we increasingly see the tech giants wield their power at the wrong targets.

When will this subcommittee seriously consider the role of edge providers either as common carriers in the information age, or how they are the ones with business models that actually use our data for their profits?

If you are going to protect consumers online, should those online protections apply to the whole internet ecosystem?

Meanwhile, Mr. Chairman, we should hear directly from the Federal Communications Commission about how this legislation will impact the vitality of the internet.

I was under the impression the majority planned to have the FCC up here to testify in the first quarter of this year. Unfortunately, that hasn't happened yet.

From a process standpoint and considering the need for the full commission to weigh in on the impact of this proposal, Mr. Chairman, will you commit to letting us have a hearing with the Commissioners before this measure is ushered through in a markup?

I know Ms. Eshoo was quite vocal last summer when Republicans wanted to match our bipartisan success of enacting the FCC reauthorization with completing an NTIA reauthorization.

Despite having had numerous hearings that included NTIA's administrator as well as former administrators and interested parties, there was still a demand by the Democrats that Mr. Redl appear again following our legislative hearing.

So what I would like to know is can we have the Commission here before we are asked to markup this legislation?

Mr. DOYLE. I will make sure to let you know when we invite them.

Mr. WALDEN. That is a little different, but thank you, Mr. Chairman, for your response.

[Laughter.]

Mr. WALDEN. And I yield back.

[The prepared statement of Mr. Walden follows:]

#### PREPARED STATEMENT OF HON. GREG WALDEN

Thank you and welcome to our witnesses, especially our sole Republican witness Mr. McDowell, a former Commissioner of the FCC.

A permanent, legislative solution produced in good faith with our Democratic colleagues is the only way to protect consumers, innovation, and an open internet. I have repeatedly called for an end to this ridiculous, partisan back-and-forth. It's time for bipartisan legislation that can actually become law. Yet, even after offering a menu of bipartisan legislative proposals at our hearing last month to preserve an open internet once and for all, unfortunately our Democratic colleagues have once again refused to work with us on a bipartisan solution.

Their partisan approach is not the answer. Title II is not necessary to preserve a free and open internet. We can permanently address blocking, throttling, and paid prioritization without the harmful, heavy-handed approach of Title II.

We heard last month about the regulatory impact of Title II on rural broadband deployment from a small Internet Service Provider, Joe Franell of Eastern Oregon Telecom. In my district in eastern Oregon and across rural America, we rely on small ISPs like Eastern Oregon Telecom to help connect our communities with high-speed internet. In an op-ed in the East Oregonian this morning, Joe wrote that the heavy hand of Title II “shifted Eastern Oregon Telecom’s focus from our consumers to regulatory interference and the draining cost of reporting and compliance” Joe went on to say that every dollar he spends on reporting to regulatory agencies is a dollar not spend on serving rural Oregon.

Frankly, Title II could provide the Federal Government near unlimited and unchecked authority to regulate and tax the internet. That is not an internet that protects consumers nor does it allow for American ingenuity to thrive. We can do better.

I’d also like to note that the internet seems to be working today, despite all the hyperbolic rhetoric to the contrary last year. So what internet crisis brings us to the hearing room today? It’s certainly not the abuses by the tech platforms that occupy the news everyday—not the limiting of conservative voices on social media, not the seeming inability to curb harmful and illicit behavior online, not how tech makes their deals to prioritize internet traffic, and not their own agreements on sharing of people’s personal information. What brings us here is that Speaker Pelosi still believes broadband providers are the real threat, and so directed the majority to act on a bill that won’t become law.

The internet of today grew dramatically with little or no Government interference. Saddling it now with archaic regulation of the 1930s monopoly-era copper landline phone company seems like an odd way to spur investment and innovation. Meanwhile, Big Tech companies want complete freedom not just from regulation, but also from liability for facilitating all sorts of harmful and illicit activity.

Twenty years ago, a Republican Congress and a Democrat President granted special liability limitations to help the tech sector to flourish. This is Section 230 of the Telecom Act of 1996, and without question this bipartisan agreement accomplished its primary objective. Online platforms are now major venues for communication and commerce, and not just in the United States but around the world. But, Section 230 was also supposed to be about responsibility. With a liability limitation in their backpocket, we increasingly see the tech giants wield their power at the wrong targets.

When will this subcommittee seriously consider the role of the edge providers either as common carriers in the internet age, or how they are the ones with business models that use our data for their profits? If you’re going to “protect” consumers online, should those online protections apply to the whole internet ecosystem?

Meanwhile, we should hear directly from the Federal Communications Commissioners about how this legislation will impact the vitality of the internet. I was under the impression that the majority planned to have the FCC up to testify in the first quarter of this year. Unfortunately, that hasn’t happened yet. From a process standpoint and considering the need for the full commission to weigh in on the impact of this proposal, Mr. Chairman will you commit to letting us have a hearing with the Commissioners before this measure is rushed to a markup?

I know Ms. Eshoo was quite vocal last summer when Republicans wanted to match our bipartisan success of enacting the FCC reauthorization with completing an NTIA reauthorization. Despite having had numerous hearings that included NTIA’s Administrator as well as former Administrators and interested parties, there was still a demand by the Democrats to have Mr. Redl appear again following our legislative hearing. Can you assure me that the majority will hold itself to the same standard in this case?

With that, I yield back.

Mr. DOYLE. I would just say to my friend—and he is my friend—that I must have missed the phone call when you said, let us get together and sit down and see if we can work together on net neutrality.

What we got instead was three bills being dropped without our knowledge, before any of us knew about it. I would just suggest to the gentleman that that’s not the way to work together.

Mr. WALDEN. Mr. Chairman, may I respond?

Mr. DOYLE. Yes, you may.

Mr. WALDEN. Thank you.

For 4 or 5 years I have had an open door. I have had draft legislation and I have publicly and privately offered up the opportunity to sit down and work through these things, and the idea of having three bills out there was simply to say here is menu of options. We didn't expect you to cosponsor those.

But we remain willing to work with you to find a bipartisan solution.

Mr. DOYLE. Yes. I am glad your door is open. Mine is too and I just—if you had wandered into it, we might have had a conversation before you dropped the bills. OK.

Let us move on. The gentleman yields back.

The Chair wants to remind Members that pursuant to committee rules all Members' written opening statements will be made part of the record.

Before I introduce our witnesses, I do want to recognize and introduce a former Member of Congress and a member of this Energy and Commerce Committee. Former Congressman Ron Klink is in the audience.

Ron, nice to see you. Welcome. Yes, you could clap for Ron.

[Applause.]

Mr. DOYLE. OK. I would now like to introduce our witnesses. Oh, and standing right in front of me. Chip Pickering, please—Chip also a member of the committee.

[Applause.]

Mr. DOYLE. Sorry, Chip.

OK. Now, let us get to today's witnesses.

Ms. Francella Ochillo, vice president of policy and general counsel for the National Hispanic Media. We also have Mr. Gregory Green, chief executive officer of Fatbeam; Mr. former Commissioner Robert McDowell, senior fellow at the Hudson Institute and partner at Cooley LLP; and last but not least, Mr. Matt Wood, vice president of policy and general counsel for Free Press Action.

We want to thank all of our witnesses for joining us here today. We look forward to your testimony.

You are each going to have 5 minutes to do your opening statements. We do not have the lighting system here in front of you, but we will be tracking this here, and once you get to your 5 minutes you will hear a little gentle tap of the gavel and know that it is time to wrap up your testimony if you haven't already done so.

So, we will start with Ms. Ochillo. You are recognized for 5 minutes.

**STATEMENTS OF FRANCELLE OCHILLO, VICE PRESIDENT OF POLICY AND GENERAL COUNSEL, NATIONAL HISPANIC MEDIA COALITION; GREGORY GREEN, COFOUNDER AND CHIEF EXECUTIVE OFFICER, FATBEAM; ROBERT M. McDOWELL, SENIOR FELLOW, HUDSON INSTITUTE, PARTNER, COOLEY LLP; MATTHEW F. WOOD, VICE PRESIDENT OF POLICY AND GENERAL COUNSEL, FREE PRESS ACTION FUND**

**STATEMENT OF MS. FRANCELLE OCHILLO**

Ms. OCHILLO. Good morning, Chairman Doyle, Ranking Member Latta, and other members of the subcommittee.

My name is Francella Ochillo. I am the vice president of policy and general counsel at the National Hispanic Media Coalition based in Pasadena, California.

For years, NHMC has advocated for a free and open internet. We help policymakers and lawmakers like you understand the impact and what is at stake for Americans who do not have the resources or the capacity to engage in these types of debates in Washington, DC.

Today, my comments are intended to reflect those voices including families, students, creators, and activists who support a free and open internet but do not have the good fortune of being able to join us in this room.

The net neutrality consumer protections that we have fought so tirelessly to restore were always intended to safeguard an open and free internet, the one that we envision for tomorrow.

Access to that open internet has revolutionized the way that we think, the way that we work, the way that we communicate, the way that we learn. It has challenged the way that we see each other and tested our willingness to grow.

In all of its wonder, the internet has also been one of the most important tools in remedying a long history of discrimination that still plagues our country.

Taking messages online was the only way that activists were able to get the nation to stop and listen to the cries of Native Americans protecting sacred lands in North Dakota and how disenfranchised voices were able to put a spotlight on unarmed African-American men being shot by police.

Online social justice movements forced people to stop and ask hard questions about contaminated water in Flint and why families seeking asylum at the border were irreconcilably separated from their children.

But when there is a premium for access, the dangerous underbelly of the internet exposes people to a risk whether or not you are online, creating a digital caste system of those who can afford to pay more. It feeds the dark chambers of the internet where division and hate speech and discrimination thrive.

Sunlight and open access—that is the best remedy because this internet has connected us in a way that, historically, our nation has been unable to do so.

It serves as the digital encyclopedia where students can go to find out why the Japanese should have never been in internment camps or the many reasons why Jim Crow was wrong.

Being able to discover those unpleasant truths about who we are as a nation and how we grow together requires that all Americans have access to the same information.

Under the current regulatory framework, ISPs have no obligation to transmit messages as is. There are no rules that prevent them from blocking content online, slowing down certain websites, or giving preferential treatment.

In essence, they have the power to decide what we see online and whose voices are heard. Simply put, this is a dangerous experiment at the expense of the American people, which should give all of us pause.

The United States regularly ranks as one of the most expensive places for internet among developed countries in the world and affordability remains the main barrier to adoption.

In 2018, approximately 24 million people still did not have access to broadband of any kind. Forty percent of those people—40 percent of Americans living in rural communities had no access and 60 percent of people living on tribal lands face the same fate.

These Americans, all on the wrong side of the digital divide, regularly find their opportunities for growth, their opportunity to participate in our democracy, as well as their upward mobility that is directly linked to their level of access.

If we can find a way to provide wife for astronauts while they are outer space, I don't understand why we can't find a way to connect people in Peoria, Illinois, or Augusta, Georgia, or Granville, Texas, or Chi mayo, New Mexico, or even in my hometown of New Orleans, Louisiana.

We have a choice. We can affirmatively protect the internet that was started with public funds and always intended for public good, or we can hope that this digital caste system of the haves and the have nots steers clear of the communities that we call home.

We have a responsibility to ensure that every American has an opportunity to participate as well as a responsibility to understand the insurmountable costs and the consequences when they are disconnected, because while they may shoulder the individual burden, there is a collective cost.

If this is, in fact, the digital revolution then that means that we are having one of the most important conversations of our time and we need to be vigilant about understanding the consequences of creating an internet where some have basic and limited access and others get a VIP pass.

We have to decide what type of digital infrastructure that we plant to leave behind for generations to come and the only questions that remains is did we stand up for them when we had the chance.

Thank you.

[The prepared statement of Ms. Ochillo follows:]



**Testimony of Francella Ochillo  
National Hispanic Media Coalition**

**Before the Subcommittee on Communications and Technology  
of the Committee on Energy and Commerce**

**“Legislating to Safeguard the Free and Open Internet”**

**March 12, 2019**

Good morning, Chairman Doyle, Vice Chair Clarke, Ranking Member Latta, and members of the committee. My name is Francella Ochillo. I am the Vice President of Policy and General Counsel at the National Hispanic Media Coalition (“NHMC”).

For years, NHMC has advocated for a free and open internet. In our presentations, comments, and filings, we continue to lift up stories of how universal access can create new opportunities for communities of color and other marginalized populations. We help policymakers and lawmakers understand what is at stake for Americans who do not have the capacity or resources to engage in the policy debates of Washington, DC. We also work to hold the Federal Communications Commission (“FCC” or “Commission”) accountable for its Congressional mandate to connect the disconnected. Today, my comments are intended to reflect those voices—including families, students, creators, and activists—who support a free and open internet, but do not have the good fortune of being able to join us in this room.

The net neutrality consumer protections that we have fought so tirelessly to restore were always intended to safeguard the internet that we envision for tomorrow. I have

never met a net neutrality supporter who wanted to slow down broadband deployment. I have never gone to a coalition meeting and brainstormed ways to reduce a company's profit margins. To the contrary, net neutrality supporters welcome innovation and strive to find ways to connect people to digital opportunities.

**Digital Rights Are Civil Rights.** Access to the internet has revolutionized the way that we think, work, and interact. It has changed how we communicate and learn, challenged the way that we see each other, and tested our willingness to grow. It is a place where a young Latina can start a YouTube channel to teach other children how to make slime and reinvent the way that an industry markets glue and where a first generation Indian American boy from Texas could launch dreams of being a spelling bee champion with his coach online. It is also the birthplace of funding platforms that breathe new life into women-own businesses that were overlooked in Silicon Valley and the reason why countless members of Congress embarked on their unlikely journeys to Capitol Hill.

In all of its wonder, the internet has also been one of the most important tools to remedy a long history of discrimination that still plagues our country. Taking messages online was the only way that activists were able to get the nation to stop and listen to the cries of Native Americans protecting sacred lands in North Dakota and how disenfranchised voices were able to put a spotlight on unarmed African-American men being shot by police. Online social justice movements forced people to ask hard questions about contaminated water in Flint and why families seeking asylum were being irreconcilably separated at the border.

When there is a premium for access, the dangerous underbelly of the internet poses a risk to people both online and offline. Creating a digital caste system of who can afford to pay more for premium access feeds the dark chambers of the internet where division, hate speech, and discrimination thrive. Sunlight, open access, may be the best remedy because the internet connects us in a way that, historically, we have been unable to do so as a nation. It serves as the digital encyclopedia where students can go to find out why the Japanese should never have been in internment camps or the many reasons why Jim Crow was wrong. Being able to discover those unpleasant truths about who we are as a nation and how we can grow together requires that all Americans have access to the same information. That is the only way for us to remedy scars of injustice and address systemic inequality.

**Current Regulatory Framework Increases the Digital Divide.** Since the turn of the century, the FCC has grappled with striking a balance between protecting consumers and promoting investment.<sup>1</sup> However, in December 2017, when the FCC repealed the *2015 Open Internet Order*,<sup>2</sup> the pendulum swung far in favor of corporate interest, leaving consumers to fend for themselves. Even though the Commission was the only federal agency with the authority and expertise to regulate the internet, it ignored the will of the American people and ceded power to Internet Service Providers ("ISPs").

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<sup>1</sup> Marguerite Reardon, *Net Neutrality: How We Got From There to Here*, CNET (Feb. 24, 2015), <https://www.cnet.com/news/net-neutrality-from-there-to-here/>.

<sup>2</sup> Protecting and Promoting the Open Internet, *Report and Order On Remand, Declaratory Ruling*, GN Docket No. 14-28, 30 FCC Rcd 5601, 5627, para. 77, FCC 15-24 (Mar. 12, 2015).

The D.C. Circuit Court of Appeals will decide on the merits of that decision. But, it is important to note that millions of Americans weighed-in on the docket and urged the FCC to protect an open and free internet. Advocates sounded the alarm and continuously explained the far-reaching consequences of the repeal, especially for those who struggle with access.

Under the regulatory current framework, ISPs have no obligation to transmit messages as is. There are no rules that prevent them from blocking content online, slowing down certain websites, or giving preferential treatment to those who can afford to pay more. They need only disclose management practices, performance characteristics, and commercial terms to cure what would have otherwise violated general conduct rules. In effect, ISPs currently have the power to decide what consumers see and whose voices are heard online. They are legally permitted to decide which messages will be prioritized and which messages will be silenced. This is a dangerous experiment at the expense of the American people which should give all of us pause.

Setting aside which regulatory framework you support, we should ask whether the current rules lay the groundwork for a 22nd century superhighway where a sixth grader in New Mexico has access to the same information as one in New York. Are we building a digital platform where out of work coal miners in West Virginia can learn how to code and contribute in real time to smart-city projects in Pittsburgh? Have we created or eliminated opportunities for people living on the margins to participate in a digital economy?

**Need to Remove Barriers to Broadband Adoption.** Access to a free and open internet has a direct impact on broadband adoption. The United States regularly ranks as one of the most expensive places for internet in the world as affordability remains the main barrier to adoption. Considering that the digital divide disproportionately impacts the low-income, people of color, and rural communities, we should scrutinize any decision that gives ISPs permission or new incentives to charge more for access.

According to the FCC, Americans rely on access to the internet for nearly every aspect of daily life, yet and still, approximately 24 million people do not have access to broadband of any kind.<sup>3</sup> Over 30% of African-American and Latino households lack access at home.<sup>4</sup> That number that climbs even higher in homes below the poverty line and explains why children in black and brown communities nationwide have no other choice but to search for free access in public spaces, such as libraries and coffee shops, to complete homework assignments. For families that are able to subscribe to broadband services, every month they have to reckon with the bill shock, especially when discounts expire, and decide between paying for other necessities and continuing with broadband services.<sup>5</sup> Notably, over 60% of Americans on rural and Tribal lands still

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<sup>3</sup> Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, *2018 Broadband Deployment Report*, 33 FCC Rcd 1660, para. 50 (2018) ("Broadband Report").

<sup>4</sup> See Andrew Perrin, Pew Research Center, *Smartphones Help Blacks, Hispanics Bridge Some – But Not All – Digital Gaps with Whites* (Aug. 31, 2017), <http://www.pewresearch.org/fact-tank/2017/08/31/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/>.

<sup>5</sup> See S. Derek Turner, Free Press, *Digital Denied: The Impact of Systemic Racial Discrimination on Home-Internet Adoption* 104 (Dec. 2016), [https://www.freepress.net/sites/default/files/resources/digital denied free press report december 2016.pdf](https://www.freepress.net/sites/default/files/resources/digital%20denied%20free%20press%20report%20december%202016.pdf).

lack access to reliable broadband<sup>6</sup> and share the same fate. They are limited in their ability to apply for jobs online, register to vote, or obtain disaster relief in times of crisis. These Americans, all on the wrong side of the digital divide, regularly find that their opportunities for socioeconomic growth, ability to participate in our democracy, and overall mobility are limited by their level of access to broadband.

**Creating A Digital Society of Have and Have Nots.** The internet was started with public funds and always intended for public good. In a digital society, access has become a prerequisite for full participation and digital rights has increasingly become one of the most important civil rights of our time. We must ensure that the internet remains an open platform without gatekeepers standing in the way. We have a responsibility to understand the insurmountable costs and consequences for the disconnected. If they are locked out of opportunities and unable to participate in the digital revolution, they may shoulder the individual burden, but we all share in the collective cost.

Finally, supporting the Save the Internet Act of 2019 should not be a partisan issue.<sup>7</sup> Americans who are on the wrong side of the digital divide in my home state of Louisiana and in your districts do not care about whether a Democrat or Republican drafted this Bill. They care whether we stood up for them when we had the chance. They are

<sup>6</sup> Broadband Report, Dissenting Statement of Commissioner Clyburn at 82.

<sup>7</sup> Admin., Program for Public Consultation, School of Public Policy, University of Maryland, *Overwhelming Bipartisan Public Opposition to Repealing Net Neutrality Persists* (April 18, 2018), <http://www.publicconsultation.org/united-states/overwhelming-bipartisan-public-opposition-to-repealing-net-neutrality-persists/> (A poll conducted by the University of Maryland found that 86 percent of voters opposed the FCC's net neutrality repeal of net neutrality, including huge majorities of Republicans, Independents and Democrats.).

depending on members of Congress to help increase their communities' access to a universal platform where they can all compete for jobs, find new educational opportunities, or build businesses online. We need to be vigilant about maintaining an internet where all Americans are able to get online without unnecessary tolls.

We built railroads, invented electricity, and have found ways to cure disease together. This is our opportunity to build the digital infrastructure required to ensure that all Americans experience the enumerable benefits that accompany online access.

Mr. DOYLE. Thank you.

We now recognize Mr. Green for 5 minutes.

**STATEMENT OF MR. GREGORY GREEN**

Mr. GREEN. Chairman Doyle, Ranking Member Latta, thank you very much, and members of the subcommittee, thank you for having me.

I am Gregory Green. I am the CEO and cofounder of Fatbeam. Fatbeam is a small ISP and fiber-based infrastructure provider in the West Coast.

Today, Fatbeam operates in seven markets—Washington, Idaho, Montana, Wyoming, and Oregon. We also just opened a region in—Southwest region in Nevada, Arizona, and New Mexico.

We build fiber optic networks in, typically, markets tier 2 and tier 3, 150,000 in population and below, and in those markets we provide healthcare providers, Government agencies, schools, education, higher ed, and other businesses, and institutions open access to our network, which also means that we share our fiber network with other ISPs such that they can deliver residential and other services that maybe we don't initially provide in that market space.

I have also been a proponent of net neutrality. Fatbeam supports net neutrality and we support very much the FCC order in 2015 for net neutrality.

In fact, since net neutrality, we have invested in eight new markets from the order coming out in 2015. Overall, we have invested \$30 million in fiber-based infrastructure—not wireless, but fiber-based infrastructure, and we are in 40 markets, as I mentioned, that we operate today.

The driver for that is, obviously—in other words, demand for our inventory and our product set is driven by our customers. When there is a need we will prevail, and we provide that solution and we very much enjoy coming into a marketplace that is requesting demand in services when in fact there is only maybe an incumbent of a cable company and a phone company in place.

In 2017, I wrote a letter—an open letter—supporting the rules for net neutrality. I was concerned about the repeal and I remain so today.

I have 20-plus years in the organization, and I am very confident that over those years we have had many successes including that in the cellular industry where we utilize Title II.

There is a fallacy that seems to be out there that there's a history and the fallacy of investment where AT&T and Comcast and others would possibly invest less money if net neutrality were to continue and, having looked at those actual numbers, there may have been a smaller investment but was very, very minuscule.

We continue to invest today, and we continue to grow our business, and net neutrality is a very large component of that because we believe in the foundation that net neutrality provides for equal access for everyone.

We know that in a lot of marketplaces that 70 percent of the consumers only have one choice for their ISP and we do not feel that is a competitive—it may be a competitive advantage but it is not an open access advantage so that the consumer ends up with what



they need at the end of the day. They need competition, they need a landscape which they can count on, and investment in the community.

I am not a lawyer. I am a businessman. But I was very much part of the bipartisan Telecommunications Act of 1996 when Craig McCaw and myself and a lot of other gentlemen began the path down a company called Nextlink.

You remember the name Nextlink and Craig McCaw. We built a company called Nextlink. It later became XO Communications, one of the first CLECs in the United States. We raised \$400 million during that time, and the Telecommunications Act of '96 gave us that very opportunity to do so.

So, I appreciate the opportunity to speak today. I appreciate the opportunity that you provided us to be a part of this. I would like to say that we very much support net neutrality and we will answer any questions that you may have today.

Thank you.

[The prepared statement of Mr. Green follows:]



Written Testimony of

**Gregory Green**  
**Co-Founder and CEO**  
**Fatbeam**

Before the

**U.S. House of Representatives**  
**Committee on Energy and Commerce**  
**Subcommittee on Communications and Technology**

Regarding

**“Legislating to Safeguard the Free and Open Internet”**

March 12, 2019

Chairman Doyle, Ranking Member Latta, and members of the subcommittee, thank you for inviting me to testify. I am Gregory Green, Co-Founder and CEO of Fatbeam. Fatbeam is a small Internet Service Provider (ISP) serving rural America. Fatbeam has long supported net neutrality because it is driving a streaming and cloud revolution, as well as transforming industries across the economy. In turn, the demand for online services and applications is driving the market for deploying more fiber optic broadband networks and growing local rural economies.

Founded in 2010, Fatbeam has evolved from a local Idaho-based competitive fiber provider, to a leading competitive regional network. With 35,000 fiber miles across the Western U.S., Fatbeam delivers fiber optic broadband in 40 cities across seven states, including the states of Washington, Idaho, Montana, Wyoming, Oregon, Arizona, and Nevada, with expansion plans for New Mexico in the future. The 40 cities Fatbeam serves are third and fourth-tier markets with less than 150,000 in population. Fatbeam offers fiber optic bandwidth starting at 1 gigabit Ethernet and extending to 400 gigabit. We also offer dark fiber.

Fatbeam serves a variety of customers including enterprise, healthcare providers, government and educational institutions, as well as other broadband providers through wholesale offerings. The company has an especially strong history with network provisioning for school districts through the E-rate program. Over the last three years, Fatbeam has partnered to delivery over 90 miles of newly constructed fiber-optic network for schools. The resulting fiber optic networks have afforded school districts access to nearly ten times their previous bandwidth and has resulted in a decrease in cost per megabyte of more than 20%, saving taxpayers money.

Over the next few years, Fatbeam is poised to capitalize on its proven track record of success as it continues to expand and deliver reliable fiber-based network services to its

customers. Time and time again, the business and anchor institutions in a community seek better communications infrastructure in order to support growing bandwidth needs for the community, to increase their commerce capacity, and grow their local economies. Once Fatbeam enters a market, communities have been transformed.

Fatbeam supported the FCC's 2015 Order that was twice upheld by the U.S. Court of Appeals for the D.C. Circuit. Fatbeam submitted an affidavit during the litigation affirming our support, noting our obligation to comply with the Order and rules as an E-rate provider, and further stating that:

With the new rules in place, Fatbeam intends to continue to expand its networks, deploy fiber and provide smaller third and fourth tier markets with competitive fiber optic broadband options. The availability of robust, high speed broadband fiber optic access service is a powerful catalyst for economic growth and development and such growth and development benefit all residents of the community.<sup>1</sup>

Indeed, Fatbeam deployed approximately 92 miles of fiber and served 8 new cities during the time in which the 2015 Open Internet Order and its rules were in effect. Neither the 2015 Order and rules nor FCC oversight deterred our investment.

At the time that the current FCC was considering its repeal of the Order, I wrote an Open Letter adding my voice to the opposition. I stated "it is a fallacy that investment in broadband by large carriers such as AT&T and Comcast will be slowed unless net neutrality is revoked."<sup>2</sup> What is driving investment in broadband is the demand to connect to online services across

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<sup>1</sup> See Declaration of Gregory Green, attached as Exhibit 5 to the Opposition of Intervenors to Petitioners' Motion for Stay, Case No. 15-1063 (May 22, 2015).

<sup>2</sup> Open Letter regarding Net Neutrality (Dec. 11, 2017), *available at* <https://www.fatbeam.com/open-letter-regarding-net-neutrality/>.

many industries, including cloud computing and remote work, telemedicine, and yes, video. The permissionless innovation on the edge that was the result of a long-held, bipartisan consensus of an open internet in the U.S. gave rise to many new opportunities that consumers and businesses rely on and want to connect to. Fatbeam builds in those areas where we can make a business case to do so because there is the demand for high-speed broadband—that demand is for access to all the online content and services that an open internet fostered. Incumbent ISP investments have nothing to do with net neutrality requirements or Title II. They invest in their networks based on demand, and I would be remiss if I did not state that it is my experience that incumbents invest *more* in broadband when competitive fiber providers enter the market.

In my Open Letter, I expressed my concern that without net neutrality rules, the large incumbent telecom and cable companies will interfere with competitors. I still have that concern. Today, the four largest ISPs in the nation have over 70% of residential broadband customers, and the majority of Americans only have one ISP option for residential broadband service. We know that such ISPs have the incentive to block, throttle and demand access fees of edge providers and those providers with which they interconnect as they have done so in the past. However, with rules in place to prevent such conduct, and with strong oversight of interconnection practices by the FCC, ISPs' incentives can be checked so that ISPs cannot discriminate against edge providers or other ISPs they interconnect with.

You have heard from small ISPs that they don't have an incentive to engage in such behavior, and they have asserted that they should not have to abide by the same rules. I can understand that perspective as Fatbeam supports its customers' access to an open internet, and we would not engage in behavior that would hinder their ability to access the online content and services of their choice. However, history has shown that small ISPs also have offended the

principles of an open internet. I believe having rules in place that every ISP has to follow are fair and they benefit all customers who have assurances knowing that no matter who their ISP is, they are protected.

The Save the Internet Act rightfully restores the FCC's 2015 Order and rules. Fatbeam supports the legislation because it will provide the assurance that all ISPs are held to the same rules—no blocking, no throttling, no paid prioritization, and no unreasonable conduct, with strong interconnection oversight. No one ISP could take unfair advantage of their market position by unreasonably discriminating against online competition or another provider with which it interconnects. I am not a lawyer, but as a businessman who has long worked in the industry, I have an appreciation for the fact that many of the market-opening, competition provisions in the 1996 Telecommunications Act reside in Title II. Indeed, I've been surprised by the denigration of that part of the Act which for me affords the protections that have helped me build Fatbeam and my prior ventures so that we can compete and offer customers an alternative to the incumbent. It imposes strong prohibitions on anti-competitive behavior and offers strong pro-consumer, pro-competition incentives. I understand that the Save the Internet Act would encapsulate all of the 2015 protections in the Communications Act, including requiring all ISPs to offer just and reasonable, non-discriminatory service so that their customers can access the online content, applications and services of their choice. Fatbeam supports this approach. It would end the long debate about which protections apply.

As a businessman I can assure you that the entire ISP industry is looking for certainty. Fatbeam encourages you to pass enduring open internet legislation. The Save the Internet Act accomplishes that goal, and I urge you to support it.

Thank you for the opportunity to testify, and I am happy to answer any questions you may have.

Mr. DOYLE. Thank you, Mr. Green.

The Chair now recognizes Commission McDowell for 5 minutes.

**STATEMENT OF MR. ROBERT M. McDOWELL**

Mr. McDOWELL. Thank you, Chairman Doyle. It is great to be here. Ranking Member Latta, Chairman Pallone, and Ranking Member Walden, it is an honor always to be back before your committee. So thank you.

I did serve at the FCC from 2006 to 2013. I am a partner at Cooley LLP. I am also a senior fellow at the Hudson Institute, but I testify today only in my personal capacity and the views today that I express are purely my own.

The debate over the best way to keep the internet open and freedom enhancing has raged for about 15 years. While the national political pendulum has swung back and forth during that time, the American internet ecosphere has blossomed as the most powerful explosion of entrepreneurial brilliance in human history.

And let us make no mistake. The American internet market is the envy of the world. The legal and regulatory framework that provided the necessary certainty and protections for the phenomenon that became the internet was rooted in consumer protection, pro-competition, and antitrust statutes such as the Federal Trade Commission Act, the Clayton Act, the Sherman Act, as well as tort and contract common law, among others.

Furthermore, a fundamental agreement in the successful public policy recipe was Title I of the Communications Act of 1934. A quarter century ago at the time of the internet's privatization, the Clinton-Gore administration made a wise choice to insulate the internet ecosphere from the heavy-handed regulation of Title II of the 1934 Act.

This monumental decision made it a crucial tipping point in historical arc of the net, enjoyed not only bipartisan and nearly unanimous support here in the U.S. but internationally as well.

In short, reliance on this time-tested legal construct created an environment where ideas hatched in dorm rooms or garages could become some of the most successful companies in the world in just a handful of years.

Light touch regulation not only allowed the internet's edge to flourish, but it also provided the certainty and stability needed for the capital markets to take the leap to invest more than \$1.6 trillion in private risk capital in broadband infrastructure since the mid-1990s.

Furthermore, it was not that long ago that the FCC itself issued unanimous and bipartisan orders classifying broadband internet access service across all platforms as an information service. I supported such efforts in concert with my Democratic colleagues as recently as 2007.

Needless to say, the political and public policy atmosphere has changed a few times since then. The FCC has attempted to regulate broadband services in various ways over the past 11 years including by classifying broadband as a Title II telecommunications service for the first time in early 2015. And most recently, it acted in December 2017 to restore the pre-2015 legal framework that was proven to work so well.

To be clear, I do not think that additional legislation is needed to protect consumers, startups, or broadband investments. The proof is in the pudding of the internet's brief but brilliant history.

Nonetheless, the public policy pendulum has been swinging back and forth above the heads of internet entrepreneurs like the sword of Damocles and has created uncertainty and it is counter-productive.

For instance, anticipating uncertainty in 2015 surrounding the Title II classification, there is evidence that capital markets slowed their investment in broadband infrastructure.

After the Restoring Internet Freedom order of 2018, investment in broadband rebounded. The time has come, however, for Congress to provide clarity and certainty by enacting new legislation.

Such an effort could end this era of bitter and vitriolic zero-sum advocacy where, in order for one faction to win others must lose.

The 116th Congress serves during a unique period in the internet's history and it has the power to forge a reasonable majority to craft new bipartisan legislation that could last for decades and serve as a beacon for an open and freedom-enhancing internet across the globe.

Any bill passed by this House must have a reasonable chance to garnish 60 votes in the Senate if there is to be any hope of it becoming law.

The only path to that goal of meaningful, positive, and constructive public policy for the internet, a law that will last beyond election cycles of two to four to eight years, is through finding that majority that offers a win-win-win scenario for all who build and are affected by the internet.

Without a large bipartisan majority, any legislative effort is, largely, symbolic. A hopeful starting point, however, could begin with the principles laid out by FCC Chairman Michael Powell in 2005, some of which were echoed by Chairman Julius Genachowski in 2010, such as no anti-competitive throttling, blocking, or prioritization.

This Congress has a rare opportunity to create a lasting legacy for the internet ecosphere and I look forward to helping you achieve it.

Thank you, Mr. Chairman.

[The prepared statement of Mr. McDowell follows:]



STATEMENT  
OF  
THE HON. ROBERT M. McDOWELL  
SENIOR FELLOW  
HUDSON INSTITUTE

**“LEGISLATING TO SAFEGUARD THE FREE AND OPEN INTERNET”**

BEFORE THE  
U.S. HOUSE COMMITTEE ON ENERGY AND COMMERCE  
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY  
UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 12, 2019

HUDSON INSTITUTE  
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**EXECUTIVE SUMMARY**

The debate over the best way to keep the Internet open and freedom-enhancing has raged for 15 years. While the national political pendulum has swung back and forth during that time, the American Internet ecosphere has blossomed as the most powerful explosion of entrepreneurial brilliance in human history. A quarter century ago, at the time of the Internet's privatization, the Clinton-Gore Administration made a wise choice to insulate the Internet ecosphere from the heavy-handed regulation of Title II of the 1934 Act. Light-touch regulation not only allowed the Internet's "edge" to flourish, but provided the certainty and stability needed for the capital markets to invest more than \$1.6 trillion in private risk capital in broadband infrastructure since the mid-1990s.

Needless to say, the political and public policy atmosphere has changed a few times since then. The FCC has attempted to regulate broadband services in various ways over the past eleven years, including by classifying broadband as a Title II communications service for the first time in early 2015. And, most recently, it acted in December of 2017 to restore the pre-2015 legal framework that was proven to work so well.

While I do not think that additional legislation is needed to protect consumers, start-ups or broadband investment, the effect of constantly-changing rules cannot be ignored. For instance, anticipating the uncertainty in 2015 surrounding Title II classification, capital markets appeared to have slowed their investment in broadband infrastructure. After the Restoring Internet Freedom order of 2018, investment in broadband has rebounded.

The time has come for Congress to provide clarity and certainty by enacting new legislation. The 116<sup>th</sup> Congress has the power to craft new bipartisan legislation that could last for decades and serve as a beacon for an open and freedom-enhancing Internet across the globe. The principles laid out by FCC Chairman Michael Powell in 2005 are a good starting point for this effort.

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**INTRODUCTION**

Chairman Doyle, Ranking Member Latta and distinguished Members of the Subcommittee, thank you for having me testify before you today. My name is Robert McDowell. I served as a commissioner of the Federal Communications Commission (FCC) from June 1, 2006, to May 17, 2013. I am a partner at Cooley LLP as well as co-leader of its global communications practice. I am also a Senior Fellow at the Hudson Institute. I testify today only in my own capacity. The views expressed today are purely my own.

**DISCUSSION**

The debate over the best way to keep the Internet open and freedom-enhancing has raged for about 15 years. While the national political pendulum has swung back and forth during that time, the American Internet ecosphere has blossomed as the most powerful explosion of entrepreneurial brilliance in human history. The legal and regulatory framework that provided the necessary certainty and protections for the phenomenon that became the Internet was rooted in consumer protection, pro-competition and antitrust statutes such as: the Federal Trade Commission Act,<sup>1</sup> the Clayton Act,<sup>2</sup> the Sherman Act,<sup>3</sup> as well as tort and contract common law, among others. Furthermore, a fundamental ingredient in this successful public policy recipe was Title I of the Communications Act of 1934. A quarter century ago, at the time of the Internet's privatization, the Clinton-Gore Administration made a wise choice to insulate the Internet ecosphere from the heavy-handed regulation of Title II of the 1934 Act.<sup>4</sup> This monumental

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<sup>1</sup> 15 U.S.C. §§ 41-58.

<sup>2</sup> 15 U.S.C. § 15.

<sup>3</sup> 15 U.S.C. § 1.

<sup>4</sup> "Turning specifically to the matter of Internet access, we note that classifying Internet access services as telecommunications services could have significant consequences for the global development of the Internet. We recognize the unique qualities of the Internet, and do not presume that legacy regulatory frameworks are

decision, made at a crucial tipping point in the historical arc of the Net, enjoyed not only bipartisan and nearly unanimous support here in the U.S., but internationally as well.

In short, reliance on this time-tested legal construct created an environment where ideas hatched in dorm rooms or garages could become some of the most successful companies in the world in just a handful of years. Light-touch regulation not only allowed the Internet's "edge" to flourish, but it also provided the certainty and stability needed for the capital markets to take the leap to invest more than \$1.6 trillion in private risk capital in broadband infrastructure since the mid-1990s.<sup>5</sup> Furthermore, it was not that long ago that the FCC itself issued unanimous and bipartisan orders classifying broadband Internet access service across all platforms as an information service.<sup>6</sup> I supported such efforts in concert with my Democratic colleagues as

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appropriately applied to it." Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd 11501, 11540 (1998)

<sup>5</sup> USTelecom, *Broadband Capital Expenditures Once Again on Upward Trajectory* (Oct. 18, 2018) at <https://www.ustelecom.org/ustelecom-broadband-capital-expenditures-once-again-on-upward-trajectory/> (last visited March 11, 2019).

<sup>6</sup> Several times, the FCC voted, in a unanimous and bipartisan fashion, to classify broadband Internet access as a Title I information service. Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, *Declaratory Ruling*, 17 FCC Rcd 4798 (2002) *aff'd* *Brand X Internet v. FCC*, ; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (Commissioner Copps concurring). Additionally, in 2007, the Federal Trade Commission issued a report, with the unanimous and bipartisan support of all FTC commissioners, outlining how competition law, rather than common carrier regulation, best suited the evolution of the Internet and related consumer protection. Broadband Competition Policy, Staff Report, Federal Trade Commission, June, 2007, at <https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf> (last visited March 11, 2019). It also warned against the unintended negative consequences of regulating the Internet as common carriage under Title II of the Communications Act of 1934:

The other ground for proceeding with caution in evaluating calls for network neutrality regulation is the potentially adverse and unintended effects of regulation 160 generally – whether it is enacted in the area of broadband Internet access or any other area. Industry-wide regulatory schemes – particularly those imposing general, one-size-fits-all restraints on business conduct – may well have adverse effects on consumer welfare, despite the good intentions of their proponents. Even if regulation does not have adverse effects on consumer welfare in the short term, it may nonetheless be welfare reducing in the long term, particularly in terms of product and service innovation. For example, prohibitions of certain business conduct, such as vertical integration into content and applications or the offering of prioritization services by broadband providers, may not have immediate effects on consumer welfare, but could result in a long-term decline in investment and innovation in broadband networks. Broadband providers that cannot differentiate their products or gain new revenue streams may have reduced incentives to upgrade their infrastructure.

Further, broad regulatory schemes almost certainly will have unintended consequences, some of which may not be known until far into the future. After all, even the most carefully considered legislation is

recently as 2007.<sup>7</sup>

Needless to say, the political and public policy atmosphere has changed a few times since then. The FCC has attempted to regulate broadband services in various ways over the past eleven years, including by classifying broadband as a Title II telecommunications service for the first time in early 2015.<sup>8</sup> And, most recently, it acted in December of 2017 to restore the pre-2015 legal framework that was proven to work so well.

To be clear, I do not think that additional legislation is needed to protect consumers, start-ups or broadband investment. The proof is in the pudding of the Internet's brief but brilliant history. Nonetheless, the public policy pendulum that has been swinging back and forth above the heads of Internet entrepreneurs like the sword of Damocles has created uncertainty that is counterproductive. For instance, anticipating the uncertainty in 2015 surrounding Title II

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likely to have unforeseen effects. In the broadband Internet context, regulation that nominally seeks to protect innovation in content and applications by prohibiting broadband providers from charging for prioritized delivery over their networks actually could erect barriers to new content and applications that require higher-quality data transmission. A new entrant in the streaming video market, for example, might prefer to purchase a certain quality of service from broadband providers, rather than investing in the server capacity and other resources necessary to provide that level of service on its own. Once a regulatory regime is in place, moreover, it may be difficult or impossible to undo its effects.

*Id.* at 159-60.

<sup>7</sup> Petition of ACS of Anchorage, Inc., *Memorandum Opinion and Order*, 22 FCC Rcd 16304 (2007).

<sup>8</sup> Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 (2015) ("2015 Open Internet Order"), *aff'd United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *reh'g en banc denied*, No. 15-1063, 2017 WL 1541517, at \*1 (D.C. Cir. May 1, 2017), *cert. denied*, Nos. 17-498 *et al.* (Nov. 5, 2018); Preserving the Open Internet, *Report and Order*, 25 FCC Rcd 17905 (2010) ("2010 Open Internet Order"); Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press *et al.* for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," *Memorandum Opinion and Order*, 23 FCC Rcd 13028 (2008) ("Comcast BitTorrent Order") (enforcing 2005 Internet Policy Statement against Comcast), *reversed Comcast v. FCC*, 1600 F.3d 642 (D.C. Cir. 2010); Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Second Report and Order*, 22 FCC Rcd 15289 (2007) (imposing network neutrality requirements on C Block in 700 MHz auction; McDowell dissenting in part, the only dissenting vote on this order and my first dissent of any kind as an FCC Commissioner); AT&T Inc. and BellSouth Corp. Application for Transfer of Control, *Memorandum Opinion and Order*, 22 FCC Rcd 5662, 5663 (2007) (imposing network neutrality requirements as a merger condition); *see also* Statement of Robert M. McDowell, Application for Transfer of Control Filed by AT&T and BellSouth Corporation, *Memorandum Opinion and Order*, WC Docket No. 06-74 (Dec. 18, 2006) at [https://transition.fcc.gov/commissioners/mcdowell/mcdowell\\_att\\_bellsouth\\_statement.pdf](https://transition.fcc.gov/commissioners/mcdowell/mcdowell_att_bellsouth_statement.pdf) (last visited Mar. 11, 2019)).

classification, capital markets slowed their investment in broadband infrastructure. After the Restoring Internet Freedom order of 2018, investment in broadband has rebounded.<sup>9</sup>

The time has come, however, for Congress to provide clarity and certainty by enacting new legislation. Such an effort could end this era of bitter and vitriolic zero sum advocacy where, in order for one faction to “win,” others must lose. The 116<sup>th</sup> Congress serves during a unique period in the Internet’s history, and it has the power to forge a reasonable majority to craft new bipartisan legislation that could last for decades and serve as a beacon for an open and freedom-enhancing Internet across the globe. Any bill passed by this House must have a reasonable chance to garner 60 votes in the Senate if there is to be any hope of it becoming law. The only path to that goal of meaningful, positive and constructive public policy for the Internet – a law that will last beyond election cycles of two to four to eight years – is through finding that reasonable majority that offers a win-win-win scenario for all who build and are affected by the Internet. Without a large bipartisan majority, any legislative effort is largely symbolic. A hopeful starting point, however, could begin with the principles laid out by FCC Chairman Michael Powell in 2005, some of which were echoed by Chairman Julius Genachowski in 2010, such as: no anticompetitive throttling, blocking or prioritization.

This Congress has a rare opportunity to create a lasting legacy for the Internet ecosystem, and I look forward to helping you achieve it.

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<sup>9</sup> Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Red 211 (2018) (“Restoring Internet Freedom Order”). USTelecom reports that capital expenditures for broadband services were \$76.0 billion in 2013, \$78.0 billion in 2014, \$77.5 billion in 2015, \$74.8 billion in 2016, and \$76.3 billion in 2017. USTelecom, *Historical Broadband Provider Capex* (2018) at <https://ustelecom.org/wp-content/uploads/2018/12/Broadband-Investment-Historical-Broadband-Provider-Capex.pdf> (last visited March 11, 2019).

## BACKGROUND

### THE HISTORY OF OPEN INTERNET POLICIES

The regulatory history of the principle of an open Internet begins with the Broadband Policy Statement, adopted in a bipartisan and unanimous fashion by the FCC in 2005.<sup>10</sup> The Broadband Policy Statement embraced four principles intended to “ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers”:

- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to access the lawful Internet content of their choice.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to connect their choice of legal devices that do not harm the network.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to competition among network providers, application and service providers, and content providers.<sup>11</sup>

This was a simple, direct approach – the entire policy statement was three pages long.

After the FCC attempted to enforce these principles in a 2008 order, over my dissent,<sup>12</sup> the D.C. Circuit largely agreed with my dissent by holding that the principles could not be enforced because they were not binding rules.<sup>13</sup> The FCC attempted to address that issue in its 2010 Open Internet Order, which adopted rules by relying aggressively on Title I and Section 706 to prohibit blocking and unreasonable discrimination while adding a transparency rule

<sup>10</sup> Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al., *Policy Statement*, 20 FCC Rcd 14986 (2005).

<sup>11</sup> *Id.*

<sup>12</sup> Comcast BitTorrent Order, 23 FCC Rcd at 13028, 13088 (Dissent of Robert McDowell).

<sup>13</sup> *Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

requiring disclosure of key terms of service.<sup>14</sup> I again dissented, concluding that the order exceeded the authority granted to the FCC by Congress and that such rules were not needed in the first place. That order also was appealed, with the court striking down all but the transparency rule.<sup>15</sup> The FCC tried again in a 2015 order, which justified the exercise of jurisdiction by reclassifying broadband as a common carrier service for the first time in the Internet's history.<sup>16</sup> That order did survive appeal, but early last year the current FCC adopted its Restoring Internet Freedom Order, reversing the Title II classification, eliminating all of the requirements other than the transparency rule, and returning enforcement authority over information service providers, such as ISPs, to the FTC.<sup>17</sup> That order is subject to an appeal that was heard by the D.C. Circuit on February 1, but has not yet been decided.

While all of this activity was going on at the FCC and in the courts, broadband companies continued to build the modern Internet we enjoy today, investing tens of billions of dollars a year, and more than 1.6 trillion in all.<sup>18</sup> The amounts of investment varied from year to year, possibly affected by the uncertainty about what rules would apply – USTelecom has found that capital expenditures for broadband services were \$76.0 billion in 2013, \$78.0 billion in 2014, \$77.5 billion in 2015, \$74.8 billion in 2016, and \$76.3 billion in 2017.<sup>19</sup> Along the way, wired and wireless ISPs have steadily improved the availability and speed of the service they

<sup>14</sup> Preserving the Open Internet, *Report and Order*, 25 FCC Red 17905 (2010).

<sup>15</sup> *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014)

<sup>16</sup> 2015 Open Internet Order.

<sup>17</sup> Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Red 211 (2018).

<sup>18</sup> USTelecom, *Historical Broadband Provider Capex* (2018), at <https://ustelecom.org/wp-content/uploads/2018/12/Broadband-Investment-Historical-Broadband-Provider-Capex.pdf> (last visited March 8, 2019); USTelecom, *Broadband Investment in 2018 Continues Upswing* (2019) at <https://www.ustelecom.org/broadband-investment-in-2018-continues-on-upswing/> (last visited March 8, 2019).

<sup>19</sup> USTelecom, *Historical Broadband Provider Capex* (2018) at <https://ustelecom.org/wp-content/uploads/2018/12/Broadband-Investment-Historical-Broadband-Provider-Capex.pdf> (last visited March 11, 2019).



offer. According to the FCC and Ookla, which tracks actual Internet speeds, average wired download speeds in the U.S. went from 11.9 Mbps in 2011 to 96.25 Mbps late last year, and average wireless download speeds went from 12.6 Mbps in 2014 to 22.69 Mbps last year.<sup>20</sup>

#### WHERE WE STAND TODAY

As I mentioned a few moments ago, today the state of open Internet obligations remains unsettled as the FCC waits for the D.C. Circuit to issue what will be the fourth open Internet decision since 2010. Even when the court rules, uncertainty will remain, because the current FCC's decision will not be the final word – just as the 2018 order reversed the 2015 order, there would be nothing to prevent a future FCC from reaching a different conclusion. So nearly 14 years after the original open Internet principles were adopted, we are no closer to a final resolution of what rules should govern Internet service providers, or others, on a permanent basis.

There is a good case to be made that there should be no new rules. The Internet has thrived since the 2018 decision, and some of the concerns that drove the 2015 rules either never materialized or are being addressed in the marketplace. For instance, while there were concerns about ISPs using personal data sent via the Internet, nearly 75% of all Internet traffic was being encrypted at the end of the third quarter of 2018, and 91% of all U.S. ISP traffic to Google is encrypted, which largely eliminates that hypothetical risk.<sup>21</sup> More prudent public policy would

<sup>20</sup> Ookla, *United States Fixed Broadband Speed Report* (Dec. 12, 2018) at <https://www.speedtest.net/reports/united-states/2018/fixed/> (last visited March 8, 2019); Ookla, *United States Mobile Broadband Speed Report* (July 18, 2018) at <https://www.speedtest.net/reports/united-states/2018/mobile/> (last visited March 8, 2019); International Comparison Requirements Pursuant to the Broadband Data Improvement Act, *Third Report*, 27 FCC Rcd 9884 (2012), at Appendix, Table 6; International Comparison Requirements Pursuant to the Broadband Data Improvement Act, *Sixth Report*, 33 FCC Rcd 978 (2018), at Appendix B, Table 8.

<sup>21</sup> Fortinet, *Quarterly Threat Landscape Report* (2018) at 7, at <https://www.fortinet.com/content/dam/fortinet/assets/threat-reports/threat-report-q3-2018.pdf> (last visited March 8, 2019); Google, *HTTPS encryption on the web* (2019) at <https://transparencyreport.google.com/https/overview?hl=en> (last visited March 8, 2019).

be produced if America had simple, understandable, permanent rules. Such a construct makes better sense than for consumers, ISPs, and edge providers to have to toggle back and forth between new rules and old rules again and again over time.

In addition, there are remedies for anticompetitive behavior under existing federal law. The Department of Justice and Federal Trade Commission have at their disposal the full panoply of U.S. antitrust and consumer protection laws to address market failures in the broadband industry should they arise. Specifically, the Sherman Act and the Clayton Act would prohibit Internet service providers from engaging in behavior that harms competition or consumers. Section 1 of the Sherman Act prohibits contracts “in restraint of trade.”<sup>22</sup> Section 2 of that Act prohibits “attempt[s] to monopolize” and “monopolization.”<sup>23</sup> While Section 3 of the Clayton Act prohibits exclusivity arrangements that may “substantially lessen competition” or “tend to create a monopoly.”<sup>24</sup> Both of those provisions can be used to protect against hypothetical bad behavior by ISPs and “edge” providers alike.

But if there are to be specific rules for broadband service providers, the 2005 principles – and specifically the first four principles – with their view toward a freedom-enhancing, open Internet, provide an appropriate blueprint for any legislation. They created a framework that ISPs and consumers alike could understand and that would not deter innovation or investment, either in the core Internet or by application and content providers at the edge.

Furthermore, what the 2005 principles did not do was impose the 19th century construct of common carriage on the 21st century Internet. By focusing on what mattered to ensuring an open Internet, the 2005 principles avoided treating Internet providers like the railroads and

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<sup>22</sup> 15 U.S.C. § 1.

<sup>23</sup> *Id.* at § 2.

<sup>24</sup> *Id.* at § 15.

telegraph operators of yore, and instead recognized that their businesses and technologies are different. It was light-touch regulation, appropriate for the lightning-fast dynamism of the Net, rather than the strict oversight imposed on state-granted monopolies, that produced the abundant Internet ecosphere the world enjoys today.

One other potential benefit of federal open Internet legislation is that a national framework is well suited to interstate commerce such as providing broadband Internet access services. Federal legislation could ensure that every participant in the ecosphere would play by the same rules everywhere, which makes compliance easier. Uniform and simple federal rules would also give consumers more certainty and clarity.

Finally, it is important that any open Internet legislation be bipartisan in nature. There is broad agreement on the basic principles of an open Internet, but there is not agreement on imposing Title II common carrier regulation on the Internet. Simple, clear and clean legislation, limited to the essential 2005 elements, has the best chance of success of passing both the House and the Senate, being signed into law by the President and lasting for decades.

## CONCLUSION

Since the FCC adopted its original open Internet principles in 2005, the chief result has been uncertainty about whether those principles would remain in place or be enforceable. This uncertainty undermines ISPs, consumers, and providers of content and applications who use the Internet to reach their customers. The best way to resolve that uncertainty is with simple, clear, focused and bipartisan legislation that will create a stable environment that will spur investment and innovation in a freedom enhancing open Internet ecosphere.

Thank you again for inviting me to appear before you today, and I look forward to your questions.

Mr. DOYLE. Thank you, Commissioner.  
We now recognize Mr. Wood for 5 minutes.

**STATEMENT OF MR. MATTHEW F. WOOD**

Mr. WOOD. Chairmen Doyle and Pallone, Ranking Member Latta, Walden, and subcommittee members, thank you for inviting me back.

Free Press Action is a nonpartisan nonprofit with 1.4 million members around the country and we support H.R. 1644, the Save the Internet Act.

Our members know that having equitable access to technology and information is the key to making change and making a living. Net neutrality is an issue of economic and racial justice. It is a timeless nondiscrimination law safeguarding people's rights to say and see what they want online, free from unjust interference by ISPs.

This bill restores the FCC's 2015 Open Internet Order released four years ago today, as luck would have it, and it brings back the three bright line bans on blocking, throttling, and paid prioritization.

But it does more than that and that's a good thing. It restores the FCC's whole decision that adopted those rules, put them on the bedrock of Title II, and forbore from the parts of that law that we don't need.

Restoring the 2015 framework is precisely the right approach on the law and the facts and is tremendously popular, too. Huge majorities oppose this repeal. Eighty-six percent, including 82 percent of Republicans, supported keeping the 2015 rules.

So when I hear we can't have the 2015 rules back because we need a bipartisan solution, it reminds me of the "Princess Bride" line, "You keep using that word. I do not think it means what you think it means."

This bill restores the FCC's power to make new rules, preventing new forms of ISP discrimination. That is why Section 202 of the Communications Act is crucial.

The FCC needs that authority to address any unreasonable discrimination like AT&T's schemes to favor its own video content and voice services or Comcast's abuse of interconnection points to slow traffic to a crawl.

Provisions like Section 201 are crucial, too. It allows the FCC to address unjust and reasonable behavior like Verizon slowing down firefighters' data.

Those who cynically say that wasn't a real net neutrality violation suggest that the FCC fiddled while forests and homes burned rather than have the power to protect people's lives and public safety.

They also say that Title II is somehow too new and untested and yet also too old while claiming, funnily enough, even older antitrust and FTC laws can protect the open internet. Their claims don't add up.

The FCC has used the 2015 framework with great success for decades for internet access, wireless voice, and business grade broadband, too. When it returned to the right law for net neutrality in 2015, that decision was upheld in the courts twice.

Some still say we have no business applying laws written for 1930s monopolies. But what about present day ones? By 2017, 39 percent of people in the U.S. still had, at most, one choice for wireless broadband offering downstream speeds of 25 megabits per second.

At 300 megabits per second, that figure is 77 percent. But even if they have a couple of choices, I doubt many constituents back home complained to you that broadband is just so darn affordable and reasonable they would be glad for no oversight at all.

Yet, while the Save the Net bill restores the FCC's ability and mandate to watch out for abuses and fraudulent billing, it also locks in the FCC's 2015 decision to forebear from rate setting under Section 205.

It also puts the FCC back on solid ground to protect a whole host of broadband rights outside of net neutrality with provisions like Section 254, offering a solid base for broadband universal service, and Section 224, granting competitive providers access to rights of way.

And it fixes in place the 2015 order's decision not to apply resale or unbundling obligations in Section 251 but, by their own terms, do apply to telephone services alone.

In sum, the bill restores not just the fundamental communications rights internet users need but the certainty that broadband providers have. That is why they continue to invest and deploy at, largely, the same pace and on the same trajectory as they did before the 2015 vote.

New numbers for 2018 show that Chairman Pai's simplistic and silly promises on booming investment after repeal have not panned out. Broadband investments and speeds trend up over time though spending does come in cycles, and it trends that way for rural carriers, too.

As my written testimony explains, one witness here last month claimed that he couldn't get a loan or expand his coverage for two years all because of Title II's supposed shadow.

Yet, during the first two years of Title II's return he invested \$2 million in fiber and tripled the speeds offered to all of his cable broadband customers in rural parts of Oregon.

Thankfully, the Save the Net Act cuts through the clutter of false claims about supposed investment impacts and it restores all of the rights that internet users need.

Thank you very much, and I look forward to your questions.

[The prepared statement of Mr. Wood follows:]



Written Testimony of

**Matthew F. Wood**  
**Vice President of Policy and General Counsel**  
**Free Press Action Fund**

Before the

**Congress of the United States**  
**House of Representatives**  
**Committee on Energy and Commerce**  
**Subcommittee on Communications and Technology**

Regarding

**“Legislating to Safeguard the Free and Open Internet”**

March 12, 2019

## INTRODUCTION

It is an honor to be here to speak about the important topic of Net Neutrality rules, and about the bill that will restore them in full and that is the subject of this legislative hearing. Thank you for inviting my organization and me to testify once more on the appropriate legal framework for the FCC's congressional mandate, which is to safeguard a broad suite of essential communications rights with these kinds of rules.

I am Vice President of Policy and General Counsel for both Free Press and Free Press Action, our 501(c)(4) entity. I'm here today on behalf of our 1.4 million members in all fifty states, the District of Columbia, and Puerto Rico, who have consistently called for reinstatement of the FCC's 2015 *Open Internet Order*<sup>1</sup> and the strong legal foundation on which it stood. That means restoring FCC authority to protect internet users both from currently identified and potential new forms of broadband providers' discriminatory or unreasonable conduct, as well as strong FCC authority to promote broadband deployment, affordability, competition, privacy, access, and public safety too.

We are proud to support fully H.R. 1644, the Save the Internet Act of 2019, introduced last week by my hometown and home district Congressman, Chairman Doyle. But lest anyone think this is a bill that only someone from the East End of Pittsburgh could love, it had an astounding 132 original co-sponsors at introduction in the House – from New Jersey to New Mexico; New York to Colorado; Michigan, Iowa and Texas; Florida to California; and Vermont to just down the road in Virginia. Sponsorship for the companion bill in the Senate is just as strong. There's good reason for that support.

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<sup>1</sup> *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("*Open Internet Order*").

### **THE *OPEN INTERNET ORDER* STRUCK THE RIGHT LEGAL BALANCE**

This hearing is auspiciously timed. As luck would have it, the FCC released the landmark *Open Internet Order* four years ago today on March 12, 2015. The Save the Internet Act of 2019 works clearly and concisely to restore the provisions of that well-reasoned and successful FCC decision. It reinstates in their entirety the rules adopted in that order, as well as its correct legal conclusions and statutory interpretations.

By doing so, it readily re-establishes what have often been called that order's three "bright-line" rules that prevented broadband providers from engaging in blocking, throttling, or paid prioritization. Those rules say that broadband providers cannot:

- block lawful internet content, applications, services or devices;
- slow down or degrade internet traffic on the basis of its source or type; or
- charge third parties for preferential delivery of their content to the broadband provider's internet access customers, or prioritize delivery for the broadband provider's own affiliated video, voice, or other applications.

With some notable exceptions, many Members of Congress in both parties – and even many cable and phone companies and their lobbying groups – now say they would be willing to enact those rules in statute (after singing a very different tune not so long ago).

Yet as explained below, those three rules alone would not be enough to preserve real Net Neutrality, let alone all of the other rights that internet users and entrepreneurs need. Thankfully, the bill works to revive the *Open Internet Order*'s transparency provisions too, including the enhanced transparency rules wrongly thrown out along with the bright-line rules by the FCC's vote in late 2017.<sup>2</sup>

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<sup>2</sup> *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (rel. Jan. 4, 2018) ("*2017 Net Neutrality Repeal*").



It also reinstates the 2015 order's critically important "general conduct rule," set forth to assess whether conduct arguably not addressed by the bright-line rules might unreasonably discriminate against, disadvantage, or interfere with internet users and uses. Plus, unlike some legislative vehicles put forward within the last several years and even the last several weeks by members of this subcommittee, the Save the Internet Act of 2019 does not limit or eliminate FCC ability to make rules interpreting, enforcing, expanding, or updating protections as technology and markets evolve.

Perhaps most importantly, the bill operates to fix in place – with this new, separate act of Congress – the statutory interpretations and declaratory rulings put forward by the FCC in 2015. In portions of the *Open Internet Order* restored here, the FCC properly classified broadband internet access as a telecommunications service subject to Title II of the Communications Act, and properly decided to forbear from applying to that service some 27 statutes and 700 agency rules under Title II – using the forbearance authority Congress granted the FCC in the Telecommunications Act of 1996.

This last benefit of the Save the Internet Act may cause the most debate, at least in this building and others like it around Washington, DC. Bill opponents will tell its sponsors that they cannot inoculate undecided Members of this House against people (or, let's be honest, it's really just cable and telecom lobbyists) saying that the Title II framework is a bad thing. Those opponents will say that restoring strong rules and returning to strong laws is bad for broadband business, and unnecessary for reinstating open internet protections. But those naysayers couldn't be more wrong when it comes to understanding the facts, reading the law, or gauging what your constituents want.

### **The *Open Internet Order* Earns Support from Overwhelming Bipartisan Majorities**

The *2017 Net Neutrality Repeal* that jettisoned this framework was wildly unpopular, just the opposite of the widely supported *Open Internet Order* this bill restores. According to a University of Maryland poll from April 2018, a full 82% of Republicans, 90% of Democrats and 85% of Independents opposed that repeal.<sup>3</sup>

That's why the Beltway political debate about the wrongly abandoned rules, order, and legal framework – all of which the Save the Internet Act rightly reinstates – would be comical if it weren't such an obstacle to settling this issue just as well as it was in 2015. That poll is not an outlier by any stretch. As the Open Technology Institute has chronicled, a whole series of polls show broad, well-informed, and longstanding support for strong rules grounded in Title II.<sup>4</sup>

Questing for a bipartisan bill should mean listening to the outpouring of support for the 2015 *Open Internet Order* from voters across the political spectrum. The Congressional Review Act ("CRA") effort to reinstate it passed the Senate on a bipartisan basis in May 2018, but was denied a vote in the House despite support from more than 180 Members. Supporters of the Save the Internet Act realize that bipartisanship does not mean inadequate compromises, driven by exaggerated industry claims of harm, all while those same industries tell the truth to their investors. Bipartisanship means doing the right thing, especially when backed by overwhelming majorities in both parties.

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<sup>3</sup> University of Maryland, School for Public Policy, "Overwhelming Bipartisan Public Opposition to Repealing Net Neutrality Persists" (Apr. 18, 2018), <http://www.publicconsultation.org/united-states/overwhelming-bipartisan-public-opposition-to-repealing-net-neutrality-persists/>.

<sup>4</sup> Amir Nasr, OTI, "The American People Broadly Support Net Neutrality," (Aug. 30, 2018), <https://www.newamerica.org/oti/blog/american-people-broadly-support-net-neutrality/> (citing polls that found support for Net Neutrality and the 2015 version of the rules among at least 75% of Trump voters).

### **The Repeal Drew on False Claims and Issued from a Fraud-Filled FCC Record**

The 2017 repeal suggested that the Title II framework re-established in 2015 was legally unsound and detrimental to broadband investments. As shown below, and in our prior testimony and filings, none of those Pai FCC claims were true. Yet another aspect of the repeal that makes it difficult to accept is that it was built on a tainted record. The FCC ignored the facts, the law, and the consequences of its policies, as well as its duty to consider legitimate comments while weeding out obviously fraudulent ones.

At the outset of the proceeding, before he'd sought public comment, Chairman Pai had already made up his mind. Based on his ideological dissent to the 2015 *Open Internet Order*, it's as if his prejudiced and pre-ordained conclusion was based on revenge. Giving a closed-door speech with industry backers to announce his plan, he said this was "a fight that we are going to win."<sup>5</sup> That's not an open-minded decision-maker.

How else to explain the fatally flawed process the FCC rushed through to repeal the *Open Internet Order*? It could not handle comments first generated in response to its repeal plans, and falsely claimed a cyberattack when really the agency was simply not ready for robust public participation in the docket.<sup>6</sup> It ignored tens of thousands of relevant Net Neutrality complaints submitted under the *Open Internet Order*.<sup>7</sup> And it allowed potentially millions of comments submitted with stolen identities and under false pretenses to remain on the record without so much as a cursory investigation.<sup>8</sup>

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<sup>5</sup> Remarks of FCC Chairman Ajit Pai at the Newseum, Washington, DC (Apr. 26, 2017), [https://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0427/DOC-344590A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0427/DOC-344590A1.pdf).

<sup>6</sup> Chris Mills, "FCC Chairman defends lying about fake DDoS attack – even after admitting he knew the truth," *BGR* (Aug. 16, 2018), <https://bgr.com/2018/08/16/fcc-ddos-attack-ajit-pai-congress-testimony/>.

<sup>7</sup> "Release: NHMC Challenges the FCC's Repeal of Net Neutrality Rules in Court" (Feb. 23, 2018), <http://www.nhmc.org/release-nhmc-challenges-fccs-repeal-net-neutrality-rules-court/>.

<sup>8</sup> See, e.g., Dell Cameron & Jason Prechtel, "How an Investigation of Fake FCC Comments Snared a Prominent D.C. Media Firm," *Gizmodo* (Feb. 21, 2019), <https://bit.ly/2NiMOMU>.

**The *Open Internet Order* Protects Unpopular Ideas and Marginalized Communities**

The Save the Internet Act would undo the unjustified repeal of the 2015 *Open Internet Order*. We’ve had the honor of testifying on the importance of that order’s rules, and on nondiscrimination rules best preserved under a streamlined Title II framework, on multiple occasions now. And as my colleague Jessica J. González testified earlier this year,<sup>9</sup> losing those rights is devastating for people of color and others all too used to fighting discrimination and fighting for their voices to be heard.

As she explained then, “[m]illions of American activists, creators, small business owners and internet users objected” to the 2017 repeal and “[p]eople of color were among some of the most vocal critics” because “never before in history have barriers to entry been lower for people of color to reach a large audience with our own stories in our own words; to start small businesses; to organize for change.”<sup>10</sup>

That kind of nondiscriminatory access to communications tools and pathways is well worth fighting for. And make no mistake: it is not just the placement of the essential safeguards in Title II (or the roman numeral “II” for that matter) that broadband providers dislike, but the vital rights and duties they’d prefer to evade no matter where in the law they reside. As I have said on a few occasions, we have to retain these protections – but if we want the same rights, we’ll have the same fights, no matter what legislative vehicle we choose. The Save the Internet Act is the best vehicle by far, but choosing another wouldn’t change the debate’s contours or the communications rights we demand.

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<sup>9</sup> Jessica J. González, Free Press and Free Press Action Fund, “Preserving an Open Internet for Consumers, Small Businesses, and Free Speech,” before Committee on Energy & Commerce, Subcommittee on Communications & Technology (Feb. 7, 2019) (“González Testimony”), [https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Gonzalez\\_Testimony.pdf](https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Gonzalez_Testimony.pdf).

<sup>10</sup> *Id.* at 4.

**The *Open Internet Order* Safeguards These Crucial Rights With Timeless Laws**

Those who try to paint the 2015 *Open Internet Order* and its Title II framework in a bad light purposefully blur the lines with an ahistorical and anachronistic approach. They suggest, sometimes in the same clumsy brush stroke, that the 2015 decision was a wholly new invention of the Obama FCC and simultaneously a relic of a bygone era. These disoriented pictures are inconsistent with one another – and with reality.

Those who say the rules restored by the Save the Internet Act magically sprang into being for the first time in 2015 either ignore or distort the true history of the Communications Act’s common carriage provisions and their application to internet access services. Title II with forbearance has long provided a light-touch, tailored framework for (relatively) competitive telecom sectors such as mobile voice, preserving nondiscrimination rights like those implemented in the now-repealed rules here.

Yet it wasn’t just voice service that remained under that law. The FCC used its Title II authority to regulate common carrier phone lines over which dial-up internet service was delivered. It treated DSL – the broadband internet access first offered by telephone companies – as a telecom service until 2005, during a time when telecom investment hit a record peak. And long after 2005, Title II applied to more than a thousand rural DSL providers who chose to continue providing broadband as a telecom service. That law still applies to business-grade broadband too, so successfully that AT&T called its use an “unqualified regulatory success story” responsible for spurring “billions of dollars” of investment in “state-of-the-art broadband networks.”<sup>11</sup>

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<sup>11</sup> Comments of AT&T Inc., WC Docket No. 05-25, at 3 (filed Apr. 16, 2013) (further arguing that Title II with forbearance promoted “the paramount federal policy of fostering deployment of advanced services”).

Once we see the facts and true history, the return to Title II in 2015 makes perfect sense. It still would make sense, from a legal perspective, even without that success. As Free Press, and dozens of public interest groups, internet companies, and state attorneys general showed in our current lawsuit to overturn the *2017 Net Neutrality Repeal*, broadband internet access is best defined as a telecom service. It offers “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”<sup>12</sup>

In other words, broadband providers deliver our speech and content. They don’t (or at least they shouldn’t be allowed to) change what we see, say, and read online. And they never have been allowed to, until the Pai FCC abdicated its authority and abandoned the path taken by prior administrations in both parties. While the legal foundation for Net Neutrality shifted over time, the FCC always tried to maintain principles or rules prohibiting network access providers from interfering with their customers’ choices.

Between 2002 and 2005, in a misguided attempt to more or less completely deregulate broadband, the FCC said broadband was an “information service,” treating a website and the wire over which people access it the same way for regulatory purposes. That approach did not stand up in court. The FCC twice argued it could preserve the open internet without treating broadband as a telecom service under Title II, and twice lost. When millions of people called on it to do so, the FCC in 2015 put Net Neutrality rules back on solid legal footing by restoring the Title II classification for broadband, and this time it won twice in appellate court.

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<sup>12</sup> 47 U.S.C. § 153(50).

### **There Is Nothing Old-Fashioned About Nondiscrimination Law Online**

The second part of *Open Internet Order* opponents' time-warped argument against Title II is that the law is old. That's all it boils down to, which is remarkable in its own right. But what these arguments about the age of the provisions in Title II fail to account for are the updates made to the law since its initial passage, to say nothing of its continued suitability for today's broadband internet access market.

It should perhaps go without saying that we rarely discard good laws based on nothing but their age. Nor should we. Yet last month, when my colleague Ms. González was here, the subcommittee was treated to a gameshow interlude featuring a blown-up photo of the Speaker of the House when the Communications Act of 1934 first passed.

With no complaints for the starring role that Speaker Henry Thomas Rainey of Illinois played that day, I wonder if we might also see a photo of Thomas Brackett Reed, Republican of Maine, the Speaker for the Sherman Antitrust Act of 1890. After all, those who oppose strong FCC Net Neutrality rules often hold up antitrust as a sufficient deterrent to harmful conduct by broadband providers. That's what the Pai FCC did in 2017, concluding that antitrust law would preserve the open internet – albeit without sufficient consideration of that law, of the great expense in bringing antitrust lawsuits far beyond the means of any individual internet user, or (apparently) of Speaker Reed's age. And how about a photo of Speaker Champ Clark, Democrat of Missouri? He presided over the passage of the FTC Act of 1914, another source of authority that the *2017 Net Neutrality Repeal* (wrongly) posited as sufficient to protect internet users.<sup>13</sup>

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<sup>13</sup> See *2017 Net Neutrality Repeal* ¶¶ 140, 143 (citing Secs. 1 and 2 of Sherman Act, Sec. 5 of FTC Act).

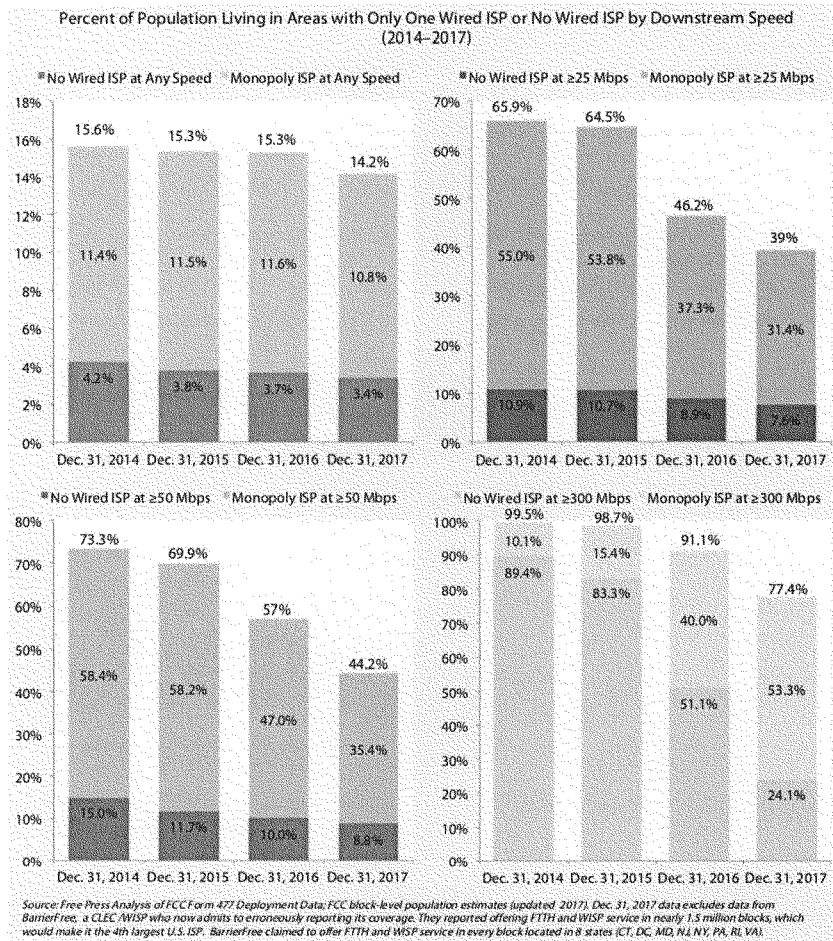
While history lessons are fun, and apparently beneficial for many Members of Congress, we should turn to a few more facts about the vitality of Title II and the protections it enshrines before returning to the new bill and specific provisions it restores.

The Communications Act received a dramatic overhaul from Congress at the outset of the internet era. That 1996 amendment crafted the “telecommunications service” definition that the 2015 *Open Internet Order* used, and that the Save the Internet Act would ratify. The Speaker of the House in 1996 was Newt Gingrich. Photos of him are still widely available on cable news, so we need not seek one here. But speaking of calls for a bipartisan bill to settle the Net Neutrality debate, it’s hard to imagine passing any bill today with the bipartisan margins that Speaker Gingrich saw. The 1996 Telecom Act passed the House by a score of 414 to 16, all without losing a single Republican vote.

Despite that last major update coming far more recently than 1934, some opponents of strong Net Neutrality rules still say that we have no business applying to internet access these rules written for “1930s monopolies.” This line of reasoning begs the question: what about present-day monopolies? Do those deserve any scrutiny? For even in 2017, the latest year for which FCC broadband deployment data is available:

- 31.4% of people in the U.S. had just one choice for a broadband provider offering downstream speeds of 25 megabits per second. Another 7.6% had no wired options at that speed.
- At higher speeds, such as a relatively modest in modern times 50 Mbps, the number goes to 44.2% of the population with just one option or no options.
- At 300 Mbps downstream, it’s a large majority of people (53.3%) that have only one wired option, while another quarter of the population (24.1%) has none.





Just as important as this illustration of the fact that broadband monopolies are all too real for too many people in the U.S., the discussion above about Title II's application to (relatively) competitive telecom services illustrates that there is no truth to the notion of common carrier rules only applying to monopolies.

As we have explained in FCC Net Neutrality proceedings seemingly countless times,<sup>14</sup> the FCC can, does, and should retain the basic building blocks of Title II for transmission services like broadband internet access – as it has in numerous markets and telecom service sectors for approaching three decades.

Think again of mobile wireless. No one thinks Verizon should be able to block phone calls if it wants, merely because customers could switch to AT&T, T-Mobile, or Sprint. Would anyone think those same carriers still ought to be allowed to block emails, instant messages, websites, or apps, just because there may be other mobile providers? That's not how transmission services work, and it's not how they should work.

#### **KEY PROVISIONS RESTORED BY THE SAVE THE INTERNET ACT**

In the final section of this testimony, we will add just three more short chapters to our extensive research on broadband investment and deployment with and without Title II and strong Net Neutrality rules in place. But first, we catalogue specific legal underpinnings of the *Open Internet Order* that the Save the Internet Act fortunately restores. For the sake of time, we'll incorporate by reference many arguments presented in our most recent testimony on the need for more than just three bright-line Net Neutrality rules (and also many general observations on investment and deployment). We'll focus first on provisions in Title II that undergird, fortify, and supplement the bright-line rules on which most parties now claim to agree.

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<sup>14</sup> See, e.g., Comments of Free Press, GN Docket No. 14-28, at 26-46 (filed July 18, 2014); see also Tim Karr, Free Press "The Biggest Lie About Net Neutrality," *HuffPost* (Oct. 7, 2014), [https://www.huffingtonpost.com/timothy-karr/the-biggest-lie-about-net\\_b\\_5657250.html](https://www.huffingtonpost.com/timothy-karr/the-biggest-lie-about-net_b_5657250.html).

**The Save the Internet Act Restores Necessary Nondiscrimination Law Beyond The Three “Bright-Line” Net Neutrality Rules**

Reciting the *Open Internet Order* bans on broadband provider blocking, throttling, and paid prioritization has become a somewhat familiar drill for people following this issue. Contrary to the dashed-off conclusions in the *2017 Net Neutrality Repeal* that discarded them, those bans are indeed necessary and address broadband provider behavior clearly harmful to expression, innovation and commerce online. Those three rules, as well as the general conduct rule, largely derive from and implement Congress’s mandate in Section 202(a) of the Communications Act.

- **Section 202(a) prohibits “unjust or unreasonable discrimination” in charges, practices, or services, or “any undue or unreasonable preference or advantage to any particular person, class of persons, or locality.”**

That authority is also a main source for the 2015 order’s good roadmap<sup>15</sup> to addressing interconnection disputes. Broadband providers have deliberately limited capacity at points where they receive traffic from other networks, and during the best-documented period of such behavior effectively throttled the delivery of Netflix content to thousands of U.S. businesses and residential customers across the country, while impacting content and services from other sites and sources too.<sup>16</sup>

The Save the Internet Act’s reinstatement of Section 202(a) is critical for allowing the FCC to make rules and weigh broadband provider conduct that violates this statutory prohibition, even if that conduct does not squarely fit within the the bright-line rules.

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<sup>15</sup> See *Open Internet Order* ¶ 205.

<sup>16</sup> See Josh Stager, Open Technology Institute, “Net Neutrality’s Achilles Heel” (Jan. 26, 2015), <https://www.newamerica.org/oti/blog/net-neutralitys-achilles-heel/>.

Broadband providers sometimes suggest there have been no Net Neutrality violations at all, before conceding there were but saying those either occurred some time ago or were eventually resolved. They try to disappear the role of the FCC in such resolutions, or downplay the necessity for FCC power to update its rules over time.

The best known examples of such behavior are set out in our February testimony<sup>17</sup> and include well-known cases of telephone companies blocking voice-over-IP services, and cable companies blocking or disfavoring streaming video services. Yet the need for residual nondiscrimination authority reserved to the FCC is probably best illustrated by behaviors such as AT&T's attempt to prevent wireless customers from using the FaceTime video chat feature on mobile networks (as opposed to only using it on wi-fi).

In 2012, AT&T said it would disable FaceTime over its customers' cellular connections unless they also subscribed to a more expensive voice plan. Essentially, AT&T separated customers from more of their money by blocking alternatives to AT&T's own products. Yet in discussions with the FCC at the time, as Free Press and other organizations considered filing a complaint regarding this practice, AT&T suggested its behavior was not subject to the then-extant 2010 version of the open internet rules because the carrier was not technically blocking all use of the application. It was merely requiring people to pay more, for a different service, in order to use their data plans as they wished. This kind of evasive argument (that bright-line rules only apply to technical measures and not economic discrimination) is put to rest by the strong protections and language of Section 202(a).

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<sup>17</sup> See González Testimony at 8-10 (citing Madison River/Vonage, Comcast/BitTorrent, *et al.*).

After adoption of the *Open Internet Order*, there were a series of short FCC inquiries into “zero-rating” schemes, with broadband providers offering not to count data from certain sources against a monthly cap. Advocates tend to agree that not all forms zero-rating may be equally bad. In theory, a relatively neutral form might treat all content or applications of the same kind alike. But in practice that is difficult to ensure, and even if ensured might be suspect under no-throttling rule language in the 2015 order. It risks favoring whole classes of applications and content over others that may be equally beneficial but ultimately disincentivized because they are not “free.”

Broadband providers and their friends in Washington took great umbrage at these inquiries, wondering how the FCC could dare to look this Trojan Horse in the mouth. Recent research suggests that zero-rating could in fact increase the price users pay, because broadband providers can and will increase the price for data used on non-exempted sources and applications to steer people towards the favored content.<sup>18</sup> The practice of zero-rating has since changed, and been rather on the decline in the U.S. wireless industry, as carriers move back towards uncapped monthly data plans but then throttle all video back to a lower speed limit when a user exceeds a monthly data amount.

These kinds of selective data “discounting” practices clearly could have a discriminatory impact, however, especially when used to favor the broadband provider’s own content as AT&T recently announced it does – even on wired broadband, where data caps are unnecessary for purposes of reasonable congestion management and serve as little but a disincentive to people’s use of the internet access service they pay for.

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<sup>18</sup> See Karl Bode, “Broadband ‘Zero Rating’ Actually Costs Customers More, Study Finds,” *Motherboard* (Feb. 7, 2019), <https://bit.ly/2EZFICh>.

In fact, AT&T's practice and business plan today bear a striking resemblance to its plan for disincentivizing use of FaceTime in 2012 and instead favoring its own products. AT&T tells broadband customers that they can use as much data as they want without penalty, but only so long as they also subscribe to an AT&T streaming video product.<sup>19</sup> With needlessly narrow bright-line rules alone, AT&T could once again attempt to justify this kind of behavior with the defense that it is not using technical traffic management practices to prevent people sending and receiving the content they choose; it's just penalizing them monetarily for doing so! The FCC should be able to at least question these practices if not uniformly ban every variety of them. The Save the Internet Act restores the authority for the FCC to ask those questions then take action.

**The Save the Internet Act Restores the FCC's Essential Mandate to Ensure that Broadband Internet Access Service Is Offered on Just and Reasonable Terms**

The second main provision in Title II that the Save the Internet Act rightly restores is Section 201(b), which also provides a foundation for the bright-line rules and for other necessary FCC rulemaking and enforcement authorities as well.

- **Section 201(b) requires all “charges, practices, classifications, and regulations for and in connection with” specified communication services to “be just and reasonable,” or declares them unlawful.**

Imprecise calls for the FCC to be prohibited from engaging in “rate regulation” miss the need to keep this Section 201(b) authority in place. They also miss the key distinction between this provision, which the *Open Internet Order* rightly kept for broadband internet access service, and the provisions from which it forbore such as the tariffing statute in Section 203 and the rate-making statute in Section 205.

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<sup>19</sup> See Karl Bode, “AT&T Lets Users Avoid Broadband Caps...If They Use AT&T's Own Streaming Service,” *Techdirt* (Dec. 21, 2018), <https://bit.ly/2Sryobf>.

The latter section gave the FCC power to not just oversee carriers' practices and prevent abusive ones, as Section 201(b) thankfully does; it gave the agency power to set (or as the statutory text says, to prescribe) the rates that carriers are allowed to charge. That kind of proceeding to determine prices is always complex, can be inefficient, and is difficult to get right. But it's the kind of so-called "utility-style" rate-making power from which the FCC chose to forbear in the *Open Internet Order*, and which the Save the Internet Act now prevents the FCC from exercising.

In light of the chart above, showing just how much of the country still faces a wired broadband monopoly at best, it is curious to hear some lawmakers suggest that the FCC should have no power whatsoever to even consider the rates charged by such monopolies – even when they may engage in price-gouging, impose punitive fees and overage penalties, undertake fraudulent or faulty billing practices, or engage in other such harmful conduct. It is difficult to imagine any lawmaker going home and hearing from their constituents on a regular basis that the price of internet access is just too darn low, and that's why they're glad the FCC gave up (or Congress took away) any and all government oversight of the prices charged by providers of this essential service.

Yet that is the only outcome of the kind of talk one hears inside the Beltway at times, about the need to eliminate any such agency authority to inquire into the reasonableness of broadband provider practices. It makes one wonder, just what "unjust or unreasonable" practices do broadband providers need to engage in? And what unjust and unreasonable practices should we be racing to bless for them?

The public safety ramifications of the FCC abdicating this type of authority were laid bare last year, with revelations that Verizon had throttled Santa Clara County firefighters responding to historically devastating wildfires. The immediate, overly academic (and incomplete) reaction from some opponents of strong Net Neutrality rules and Title II was that this wasn't a "real" Net Neutrality violation. It was just a data cap issue between the wireless broadband provider and its own customer, not discriminatory throttling based on the source or sender of the data, they said.

This fiddling while wildfires burn entirely misses, or wilfully obscures, the point: the few provisions in Title II rightly restored by the Save the Internet Act do more than just prevent discrimination, they allow the FCC to assess and prevent other forms of unjust and unreasonable behavior. And that is a very good thing for internet users, businesses, and public safety too, in times of emergency and otherwise.

**The Save the Internet Act Restores the Strongest FCC Authority to Promote Broadband Deployment, Affordability, Choice, Privacy, Access, and Public Safety**

In our testimony last month, we listed a broad range of tasks the FCC could best undertake from the solid starting point of Title II authorities retained in the *Open Internet Order*. In addition to the powers under Section 201 and 202 discussed above, we listed<sup>20</sup>:

- Promoting broadband deployment, affordability and competition;
- Modernizing and promoting the Lifeline program;
- Protecting users from privacy invasions by ISPs; and
- Ensuring reasonable access for disabled people.

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<sup>20</sup> See González Testimony at 6-7.



To explain the benefits of the Save the Internet Act's approach, fixing in place the forbearance decisions made in 2015, I'll briefly discuss here four sets of statutory provisions the prior FCC rightly retained for broadband internet access service in the *Open Internet Order* — plus, one set from which that 2015 order understandably forbore.

➤ **Section 254: Using the Universal Service Fund for broadband internet access.**

Proper treatment of the FCC's jurisdiction to promote universal access to advanced telecommunications services, including broadband internet access service, could fill an entire law review article. Suffice it to say for now that the Commission's express authority for providing Universal Service Fund dollars to broadband providers flows through Title II, with its provisions requiring that support go only to "eligible telecommunications carriers" designated by the FCC or the states.

The current FCC may claim some other power to grant funding for such carriers' broadband networks or Lifeline offerings under other provisions of the law. Yet its abandonment of Title II, Section 254, and the telecom services classification for broadband meant the FCC abandoned its ability to provide funding to new entrants and other entities that may wish to provide a broadband-only service supported by USF.

This decision (along with the Pai FCC's decision to likewise walk away from Section 706 as a grant of substantive authority) leaves no solid mandate in place for incumbent telephone companies to provide broadband service, only the option to do so if they so choose. It also shuts out Lifeline Broadband Providers that were already offering innovative services to program participants before Chairman Pai took the reins at the FCC and almost immediately revoked their eligibility to offer service.

The Save the Internet Act restores application of the telecom services definition to broadband internet access, and with it eligibility for broadband to receive support as a telecommunications service, obviating the need for the house-of-cards the Pai FCC has thrown up to justify its policy preferences in awarding universal service support.

➤ **Section 224: Granting access to infrastructure and rights-of-way.**

The *2017 Net Neutrality Repeal* offers no guarantee that broadband internet access providers can gain access to poles, conduits, and other rights-of-way controlled by power companies or incumbent telecom companies. All it provides is the empty assurance of a finger-wagging warning that the repeal should not be read as encouraging denial of access to such rights-of-way.<sup>21</sup> Unsurprisingly, competitive providers and would-be new entrants prefer legal protections for nondiscriminatory access in Section 224(f), for example, not unenforceable assurances. That is why more than forty broadband providers opposed the FCC's repeal of the Title II framework,<sup>22</sup> and favored retaining Section 224, because without that law they could be shut out of providing service. The Save the Internet Act restores these rights for competitive providers.

➤ **Section 222: Preserving statutory privacy duties for broadband providers.**

The 115th Congress's passage of a Resolution of Disapproval striking down the FCC's 2016 broadband privacy rules undoubtedly complicates, or more likely prohibits, agency re-adoption of rules to implement the mandates of Section 222 for broadband internet access providers once they are reclassified as telecommunications carriers.

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<sup>21</sup> See *2017 Net Neutrality Repeal* ¶ 186.

<sup>22</sup> See Ernesto Falcon, EFF, "More than 40 ISPs Across the Country Tell Chairman Pai to Not Repeal Network Neutrality and Maintain Title II Enforcement" (June 27, 2017), <https://www.eff.org/deeplinks/2017/06/isps-across-country-tell-chairman-pai-not-repeal-network-neutrality>

Yet what that CRA vote did not do and could not do was remove the affirmative obligations that all telecom carriers have under Section 222 to safeguard their customers' confidential information, and not to use customers' proprietary network information for purposes other than the provision of telecom service without those individuals' consent.

While some privacy CRA proponents touted removal of those FCC rules as a positive step, internet users took a decidedly different view of that vote, and they have yet to see the new comprehensive internet privacy laws promised to replace those rules.

➤ **Sections 225/255/251(a)(2): Ensuring disabilities access.**

Although the *Open Internet Order* acknowledged the passage of the landmark Twenty-First Century Communications and Video Accessibility Act of 2010 providing new protections for accessibility of communications services, it decided nonetheless to retain three specific sections or paragraphs that provide at least incremental and additional safeguards for individuals with different accessibility needs – along with more robust FCC enforcement capabilities for this entire suite of rights. The Save the Internet Act restores the *Open Internet Order's* conclusions in this regard, reinforcing disabilities access laws outside of Title II with these longstanding authorities in Title II as well.

➤ **Section 251: Forbearing from inapplicable interconnection and resale duties.**

The *Open Internet Order* did forbear however, from remaining provisions in Section 251, along with what it termed related interconnection and market-opening provisions in Sections 252 and 256. To avoid any confusion from the multiple uses of the term “interconnection” made in both FCC orders subject to this bill, it must be said that the interconnection obligations spelled out in Section 251 (and even Section 201(a))

govern interactions only between telecommunications carriers and other carriers. That means that, even without forbearance from Section 251(a)(1), this specific provision arguably might not govern the types of interconnection disputes referenced above between broadband internet access providers and any non-carriers.

When it comes to the resale provisions in Subsections 251(b) and (c), it must be said that Free Press has long identified (in our 2016 report *Digital Denied* and elsewhere) the lack of resale options in wired broadband as a market failure. That decreases consumer choice, drives up prices, and deprives people of wired broadband service plans on better terms and conditions (*i.e.*, plans that might be more widely available or free of credit checks and other racially discriminatory impediments to adoption). We still advocate that Congress, the FCC, and other policy-makers take steps to assess and then address this market failure. It is nevertheless quite understandable that the *Open Internet Order* chose not to retain the wholesale and interconnection duties in Section 251 that, on their own terms, apply only to local exchange carriers (*see* Section 251(b)), or exclusively to incumbent local exchange carriers' telephone exchange service (*see* Section 251(c)(2)(A)) and ILECs' unbundling obligations.

#### **NEW DATA ON EFFECTS OF THE *OPEN INTERNET ORDER*'S ADOPTION AND REPEAL ON BROADBAND INVESTMENT AND SPEEDS**

Our February 2019 testimony reiterated obvious truths about broadband coverage and speed improvements – before, during, and after the *Open Internet Order* and its repeal – shown in broadband providers' own investment and deployment data.<sup>23</sup>

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<sup>23</sup> See González Testimony at 12-26.

Free Press has long used broadband providers' own SEC disclosures to show the true impact – or, more aptly, lack of any impact – of FCC Net Neutrality rules on broadband provider investment and deployment. Ranking Member Walden said in the last hearing, without challenging them, that Free Press may use our “own figures, . . . or wherever [we] got the data.” We got it directly from investment reports of publicly traded companies, and deployment reports that broadband providers file on FCC Form 477.

Beyond claiming (falsely) that the *Open Internet Order* had harmed investment, Chairman Pai and his allies predicted that the 2017 repeal would increase broadband investment. But now we have new data proving that individual broadband providers' capital expenditures have not uniformly skyrocketed since the FCC's repeal vote, even as coupled with massive corporate tax cuts. In fact, many of the largest broadband providers have now reported decreased expenditures in 2018, the year that repeal took effect.

As always, we caution against over-reliance on aggregate investment expenditures, the sheer dollar amount spent by ISPs, or other such blunt metrics easily swayed by temporary changes in either direction at any large firm. Aggregates obscure changes (if any) in investment decisions, cycles, and strategies by all individual firms that make up the total. Those firms' decisions and directions may vary from one another, with broadband providers explaining to their investors the reasons for their individual decisions based on technological upgrade cycles that different companies move through at different times. As AT&T itself concluded, “there is no reason to expect capital expenditures to increase by the same amount year after year.”<sup>24</sup>

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<sup>24</sup> Comments of AT&T, WT Docket No. 10-133, at 34 (filed July 30, 2010).

Three additional data points and data sets have come to light since the February 2019 hearing on this topic. Because of the persistent unsupported claims and outright falsehoods surrounding this question, we close with summaries of these developments covered more fully in our other articles and filings.

**A Broadband Provider Witness Claims at the Subcommittee’s Initial Hearing on this Subject Did Not Detail the Full Extent of His Investments Under Title II**

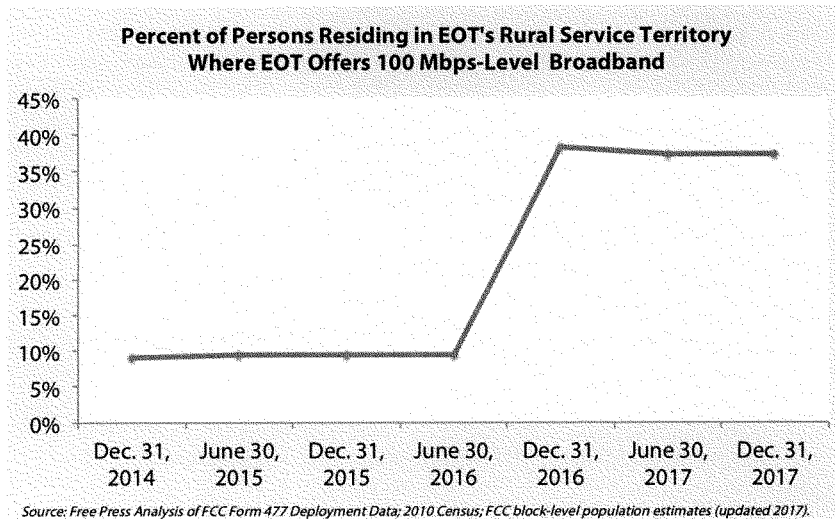
Last month in this same hearing room, an Eastern Oregon Telecom (“EOT”) executive testified about the supposed chilling impact the Title II framework restored in 2015 had on his business. His testimony was meant to suggest that ratifying that same legal framework, as the Save the Internet Act does, would be bad for small and rural broadband providers. Fortunately for the bill’s sponsors – and in fact, fortunately for EOT’s business prospects, if not the probative value of its congressional testimony – EOT continued right on investing and improving service under Title II.

EOT testified last month that during 2015 and 2016, the company “could not get loans from the bank” saying it was “only as we started to hear the commitment from the new FCC to repeal Title II that we started to see the cash open up.” Free Press Action has no way of knowing what passed between EOT and its bankers or prospective investors. We can only assume that those specific statements were true, at least in some respect. But here’s what we do know now,<sup>25</sup> based on a review of FCC broadband deployment data self-reported by EOT, and based on a cursory internet search.

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<sup>25</sup> See S. Derek Turner, Free Press “Tale Tales and Title II,” (Feb. 15, 2019), <https://www.freepress.net/our-response/expert-analysis/insights-opinions/tall-tales-and-title-ii>. The post links to EOT’s joint press release with Huawei, contemporaneous news stories, and additional sources.

- In March 2015, just a few days after the FCC's historic vote returning to Title II, EOT and Huawei put out a joint press release announcing a new fiber-to-the-premises deployment project that would bring gigabit service to "over 8,000 homes and businesses in Hermiston and the surrounding area." The release announced initial deployment in late 2015, continuing into 2016. A local newspaper report that same day quoted the EOT witness saying that with the new build EOT "expects to invest \$2 million" on the project.
- EOT substantially expanded its cable footprint into previously unserved areas; upgraded 100 percent of its cable lines to higher-capacity DOCSIS 3; and more than tripled the marketed downstream speeds of all of these cable-modem lines from 30 Mbps to 100 Mbps. This upgrade occurred predominantly in 2016 as well – that is, long before Donald Trump's election, and before EOT could have "started to hear the commitment from the [Trump] FCC to repeal Title II."
- A substantial number of EOT's deployments and upgrades made during this time were in areas classified as rural or unpopulated blocks as of the 2010 Census. Between the end of 2014 and the end of 2016, EOT expanded its total number of rural blocks served by 24 percent; the number of rural blocks where it offers cable-modem service by 315 percent; and the number of rural blocks where it offers fiber service by 25 percent.



In the end, this trajectory is not surprising, even for a rural ISP in the briefly restored Title II era. While investment information is harder to find for non-publicly traded companies, we've seen providers before tell a friendly ear at the FCC or in Congress one thing while they did another. Right before the FCC voted to repeal the Net Neutrality rules in 2017, five other small providers trooped in to tell Chairman Pai they were suffering under Title II. On examining their self-reported data, Free Press found all five were "either greatly expanding their service territory, expanding it somewhat more modestly, or deploying new technologies and faster speeds."<sup>26</sup>

**FCC Broadband Deployment Data for 2017, the Pai FCC's First Year, Shows Increases at the Same Pace as Before and After the 2015 Title II Vote**

All of the broadband deployment, coverage, speed, and competition data summarized in our February testimony tells a remarkably consistent story on the level of deployment and capacity upgrades during the period that followed the FCC's adoption of the *Open Internet Order*. There is irrefutable evidence that broadband progress continued unhindered by restoration of Title II and adoption of strong rules.

We are now able to analyze FCC Form 477 data for year-end 2017 as well, which of course reflects only a few weeks time after the Pai FCC actually voted in December of that year on the repeal. But to use EOT's framing, if not its false conclusions about that timeframe, broadband providers knew for all of 2017 that the newly installed FCC chairman was likely to make good on his promise of repealing the rules and running away from Title II. Did broadband investments leap in anticipation of that repeal?

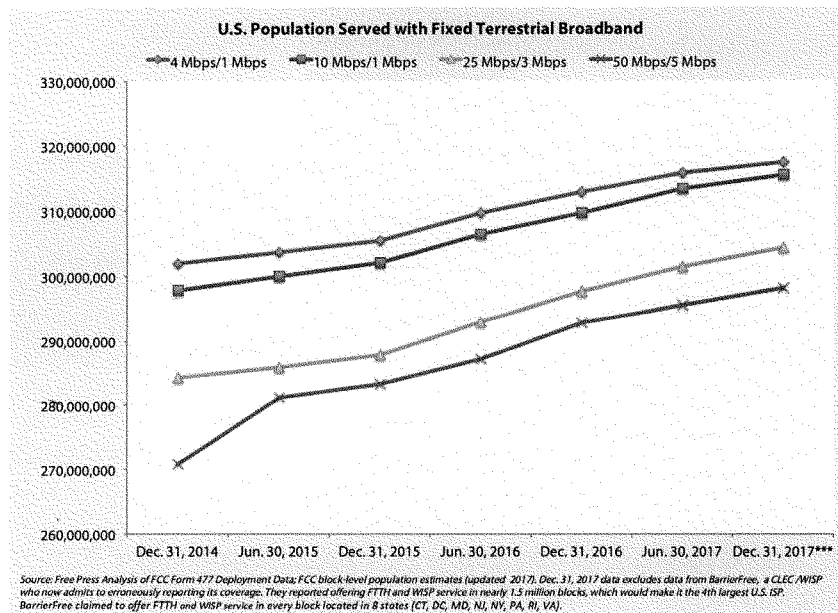
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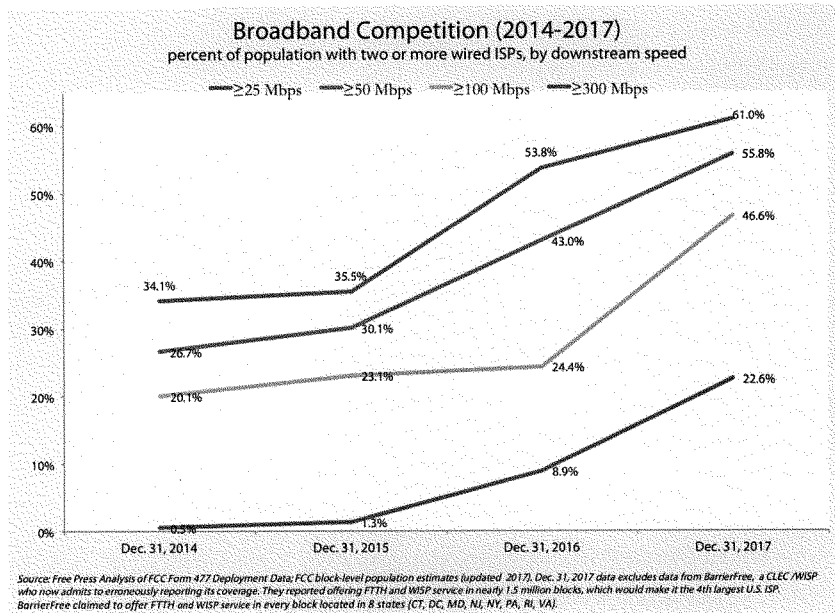
<sup>26</sup> See Letter from Matthew F. Wood, Free Press, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-108 (filed Dec. 11, 2017), [https://www.freepress.net/sites/default/files/legacy-policy/free\\_press\\_net\\_neutrality\\_investment\\_ex\\_parte.pdf](https://www.freepress.net/sites/default/files/legacy-policy/free_press_net_neutrality_investment_ex_parte.pdf).



The short answer is: No. Improvements in wired broadband coverage, speeds, and choices continued on the same trajectory seen from the end of 2014, before the FCC adopted the *Open Internet Order*, through the time that order remained in place and seemed in no jeopardy before the 2016 election. The fact that these continuing upgrades have not yet ensured broadband fast enough or ubiquitous in every rural market, or within each local market, is no reason to believe that repealing the rules will change the trajectories we see holding steady before, during, and after Title II's return.

Two sample charts, updated with 2017 data, illustrate the steady (if by no means sufficient in every congressional district) pace of broadband improvements during this period, unaltered by continued debate over how to preserve Net Neutrality.





### Many Large Broadband Providers Decreased Their Investments in 2017 and 2018, Even After the 2017 Net Neutrality Repeal Vote

When we testified on this topic last month, we noted that many major ISPs had begun reporting their 2018 revenues and investment numbers.<sup>27</sup> At that point, Verizon already had reported an investment decrease for 2018 when compared to 2017. So had AT&T, which announced that instead of the tax-cut fueled job growth it had promised it would be laying off workers.<sup>28</sup> And Comcast reported that capital expenditures for 2018 likewise decreased, after double-digit growth in the years when Title II was in place.

<sup>27</sup> Timothy Karr, "Pai is No Jedi," Free Press (Jan. 31, 2019), <https://www.freepress.net/our-response/expert-analysis/explainers/pai-no-jedi>.

<sup>28</sup> Jon Brodtkin, "Report: AT&T plans layoffs despite claiming tax cut would create 7,000 jobs," *Ars Technica* (Jan. 9, 2019), <https://arstechnica.com/information-technology/2019/01/att-reportedly-plans-layoffs-despite-tax-cut-and-fcc-deregulation/>.

Now that numbers are in for almost all publicly traded broadband providers, we can update our chart showing investment changes across all of these large ISPs. As before, we caution against reading too much into aggregate totals, and focus more on individual companies' changes.

We see now even more clearly that the Net Neutrality repeal, coupled with giant corporate tax cuts, didn't even move the needle in a positive direction – despite a series of Commission and broadband provider claims that explosive growth was bound to occur as soon as the repeal appeared on the horizon.

With 2018 in the books, and a year-plus elapsed after the Title II repeal vote, several individual broadband providers are spending less than they did prior to that repeal and other favorable regulatory changes they've obtained from this administration. In fact, many are spending markedly less since Chairman Pai's confirmation than they did in the two years prior to that, with Title II in place.

On an inflation-adjusted basis, Verizon saw a 6.4% decline for the most recent two-year period, while Comcast's growth slowed to 3% compared to 23.7% growth in 2015-2016. Even allowing for accounting complications introduced by the AT&T/DIRECTV merger, and other changes affecting accounting for Sprint's expenditures on leased handsets, the inflation-adjusted aggregate investment total for this collection of publicly traded broadband providers increased by at least 3.6% in 2015-2016, but dropped by 0.3% in the two years thus far of the Pai era.

**Capital Expenditures by Publicly Traded Broadband Providers (2012-2018) (Inflation-Adjusted)**

Capital Expenditures (\$ thousands, 2018 inflation-adjusted dollars)	2012	2013	2014	2015	2016	2017	2018	2015-2016 Change from 2013-2014 (Title II Era)	2017-2018 Change from 2015-2016 (Pai Era)
Comcast (cable segment)	\$5,363,890	\$5,835,240	\$6,586,920	\$7,462,400	\$7,899,840	\$8,111,040	\$7,716,000	23.7%	3.0%
Charter (pro forma)	\$5,897,990	\$6,048,000	\$7,545,640	\$7,387,140	\$7,846,800	\$8,854,620	\$9,125,000	12.1%	18.0%
Altice USA (pro forma)	\$1,415,349	\$1,380,040	\$1,363,049	\$1,372,533	\$993,899	\$970,376	\$1,153,589	-13.7%	-10.2%
Mediacom	\$274,641	\$285,538	\$275,612	\$305,540	\$348,580	\$348,600	\$333,726	16.6%	4.3%
Wide Open West	\$172,438	\$239,652	\$269,533	\$245,814	\$299,000	\$307,326	\$314,100	7.0%	14.1%
Cable ONE	\$170,699	\$153,305	\$189,818	\$171,549	\$152,895	\$182,950	\$217,766	-5.4%	23.5%
GCI	\$159,181	\$194,998	\$188,437	\$186,809	\$222,745	\$193,153	\$163,900	6.8%	-12.8%
AT&T (pro forma w/ ATN & Leap)*	\$22,052,956	\$23,113,012	\$22,933,310	\$21,215,900	\$23,304,320	\$21,981,000	\$21,251,000	-3.3%	-2.9%
Verizon (total company)	\$17,630,750	\$17,932,320	\$18,394,370	\$18,841,500	\$17,741,360	\$17,591,940	\$16,658,000	0.7%	-6.4%
CenturyLink (pro forma)	\$3,991,580	\$4,112,640	\$4,233,990	\$4,347,060	\$4,487,600	\$4,309,500	\$3,175,000	5.8%	-15.3%
Frontier	\$815,764	\$685,460	\$736,263	\$914,780	\$1,457,040	\$1,211,760	\$1,192,000	66.8%	1.3%
Windstream	\$1,200,308	\$908,280	\$841,555	\$1,118,618	\$1,029,392	\$926,772	\$787,600	22.8%	-20.2%
Cincinnati Bell Pro forma)	\$484,955	\$305,845	\$298,536	\$405,592	\$399,611	\$311,912	\$265,936	33.2%	-28.2%
TDS Telecom (Wireline and Cable)	\$172,858	\$160,255	\$183,446	\$203,526	\$168,664	\$204,824	\$232,000	8.3%	17.4%
US Cellular	\$912,055	\$796,501	\$596,648	\$565,036	\$463,872	\$478,836	\$515,000	-26.1%	-3.4%
Consolidated Comm. (pro forma)	\$293,181	\$284,010	\$266,508	\$265,099	\$251,900	\$235,477	\$244,816	-6.1%	-7.1%
Shenandoah (pro forma)	\$97,068	\$126,390	\$73,008	\$73,860	\$180,160	\$149,419	\$136,641	27.4%	12.6%
Alaska Comm. System	\$64,193	\$52,026	\$54,823	\$51,386	\$41,913	\$33,237	\$40,185	-12.7%	-21.3%
Otelco	\$6,929	\$6,727	\$6,436	\$7,009	\$7,154	\$8,681	\$7,994	7.6%	17.7%
Sprint (revised)	\$4,639,040	\$7,545,960	\$6,056,200	\$11,632,440	\$7,757,360	\$9,874,620	\$12,261,000	42.5%	14.2%
T-Mobile	\$3,162,090	\$4,347,000	\$4,619,190	\$5,007,440	\$4,890,080	\$5,341,740	\$5,541,000	10.4%	10.0%
Aggregate Total	\$68,977,915	\$74,513,199	\$75,713,292	\$81,781,030	\$79,944,185	\$81,627,784	\$81,332,253	7.7%	0.8%
Aggregate Total w/ DirecTV	\$72,628,325	\$78,602,079	\$79,164,042	\$83,434,630	\$79,944,185	\$81,627,784	\$81,332,253	3.6%	-0.3%
Aggregate w/o Sprint and AT&T**	\$42,285,919	\$43,854,227	\$46,723,782	\$48,932,690	\$48,882,505	\$49,772,164	\$47,820,253	8.0%	-0.2%

\* AT&T did not report pro forma w/ DTV

\*\* We present these results because of the accounting complications introduced by the DTV merger and subsequent accounting standard changes impacting a portion of Sprint's capex. We caution against drawing broad conclusions from industry aggregate capital investment trends, particularly those that do not include 100 percent of the industry, and this removal of 2 of the 21 firms demonstrates how the industry aggregate value is impacted by accounting and post-merger issues.

Source: Free Press analysis of company SEC filings. Values are presented in 2018 inflation-adjusted thousands of dollars. Where possible the most recent or restated values are presented. Accounting standard changes resulted in Sprint substantially revising its values, but only did so historically beginning with June 30, 2016 results. Prior Sprint periods are Free Press' revised estimates. Windstream has yet to report Q4 2018, thus the value for FY 2018 is estimated.

Mr. DOYLE. Thank you, Mr. Wood.

So, we have now concluded opening remarks and we are going to move to Member questions. Each Member will have 5 minutes to ask questions of our witnesses.

Let me say to my colleagues that I am very interested in your questions but not after they go over 5 minutes. So, I would ask all of our colleagues to get their final ask in before their 5 minutes. We will allow the witnesses to answer a question if it goes past there. But let us all respect one another's time as we move forward.

And I will start and try to set a good example by recognizing myself for 5 minutes.

Mr. Wood, this bill would permanently prevent the FCC from enforcing the majority of Title II. Let me say that again for all my colleagues.

This bill would permanently prevent the FCC from enforcing the majority of Title II. However, it would keep the prohibition on unjust and unreasonable practices.

I want to know why you think this provision is necessary and what are some examples of practices that were not violations of the three bright lines that we all seem to agree on that limits blocking, throttling, and paid prioritization?

What are something outside the three bright lines that would be a violation of unjust and unreasonable standards and why we need that section in the bill?

Mr. WOOD. Thank you, Chairman Doyle. I mentioned the firefighter example. I think that one cries out for attention. It was not necessarily a throttling violation under one of the bright line rules because Verizon was not throttling content coming into the firefighters. It was, basically, slowing them down no matter what they were doing with their service.

So the unjust and unreasonable standard in Section 201 actually couples with the nondiscrimination standard in 202 and would apply in situations like that.

It would apply to fraudulent billing practices or other sort of price gauging that ISPs might engage in, not with the FCC deciding what rates providers could charge but having at least some oversight of that rate making that the providers do for themselves.

Mr. DOYLE. Mr. Green, at our last hearing we heard from another small ISP about how open internet rules hurt investment in his network.

I am curious, did the 2015 rules or FCC oversight hurt your ability to get financing or impact your investment in any way, and has a potential investor ever declined to invest because of net neutrality rules?

Mr. GREEN. No. We have, in fact, had great success with net neutrality rules. The discussion maybe comes up once in a while because it is so public. But I actually sit on the board of an organization, Northwest Washington—excuse me, Northwest Telecommunications Association.

I am very familiar with the member that you are referring to—the ISP. We certainly—I certainly have a position to disagree with the opinion that it has any way deterred any investment into our sector by any such imagination.

So, we have had great success since the Act in 2015.

Mr. DOYLE. Thank you.

Ms. Ochillo, are you concerned that, based on Chairman Pai's restoring Internet Freedom Order that millions of Lifeline subscribers could be at risk of losing access and does Save the Net bill put Lifeline program on a firmer legal footing?

Ms. OCHILLO. Thank you for that question, because I didn't have time to focus on Lifeline in my opening statement and it is one of the programs that my organization is most passionate about.

Lifeline is the only Federal telecom subsidy for people who are in need to actually get connections to both broadband internet via phone or wireline phones at home and I think that it is important for us to recognize that Title II is where the actual authority for FCC to have those types of universal service plans comes from.

I think that this bill is something that we need. I think that it is important for the FCC to have express authority to do universal service programs like Lifeline and the others that are funded through the USF program.

Mr. DOYLE. Thank you.

Mr. Green, tell me, how does Save the Net bill help your business, and do you feel that it balances appropriate net neutrality rules with regulatory certainty that you need to conduct your business?

And I am just curious, are you comfortable with the obligations that the Save the Net bill would put on you as well as the way that it preserves the integrity of the product you sell access to—an open internet?

Mr. GREEN. Thank you for the question, Mr. Doyle.

I am very much a proponent of Save the Internet. I think that it gives us all the protections, and I don't just mean a few. I mean all of the protections that are necessary such as interconnection, enforcement, and conduct. So, I very much support Save the Internet.

Thank you.

Mr. DOYLE. Thank you very much.

And with 45 seconds left on my time, I am going to yield back to set a good example for the rest of our colleagues and I am now going to ask my friend and ranking member, Mr. Latta, you have 5 minutes to ask questions.

Mr. LATTI. Thanks, Mr. Chairman, and again, thanks to our panel of witnesses for being with us today.

Mr. McDowell, if I could start my questioning with you. My concern with reinstating Title II is that the broad authority it provides would open the door to intrusive Government regulation that has nothing to do with net neutrality.

Will you answer yes or no to whether Title II could lead to the following scenarios?

The Government setting prices.

Mr. MCDOWELL. Yes, Title II could.

Mr. LATTI. The Government determining what services ISPs could offer consumers and whether and how they could be bundled?

Mr. MCDOWELL. Yes, Title II does that as well.

Mr. LATTI. The Government directing where ISPs put their investments and how much they should earn.

Mr. MCDOWELL. Title II has that authority—that power, yes.

Mr. LATTA. The Government dictating how parts of the internet should be interconnected and on what terms.

Mr. McDOWELL. Yes.

Mr. LATTA. The Government requiring ISPs to share networks they have built with private capital.

Mr. McDOWELL. Yes, same answer.

Mr. LATTA. OK. Let me move on.

I want to clarify something from Mr. Wood's testimony, contrary to his argument. Before 2015 the FCC had never classified broadband internet access under Title II.

I would like to introduce for the record a letter you wrote back in May of 2010 to then Chairman Henry Waxman, which explains how the FCC issued a series of orders all without dissent that classified all broadband services as information services.

Mr. Chairman, I would like to offer that for the record.

Mr. DOYLE. Without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mr. LATTA. Thank you very much.

Mr. McDowell, will you explain to us why it is a myth that broadband was regulated under Title II?

Mr. McDOWELL. So as I outlined in that letter, which is almost nine years old but the history remains the same, so you can go back to the 1996 Act when Congress had a chance to make a distinction between enhanced and basic services, which it did.

So think of enhanced services as advanced services or computer-to-computer communications, going back to the computer inquiries at the FCC. So it is their storage forwarding processing of data is there something—some other service other than a pure transmission service.

So, Congress looked at that in 1996 and then the FCC in 1998, pursuant to the prompting of Senator Ted Stevens, issued what would be called in the vernacular the Stevens report.

So this was the Clinton—second Clinton term and this was Chairman Bill Canard of the FCC—which looked at the emerging broadband or internet access space, which became broadband—and concluded that those services—internet access services—were rightly in Title I.

Where this gets confusing or sometimes gets deliberately conflated is what do you do about the underlying transmission facilities if they are owned or operated by a carrier that is otherwise providing Title II services.

So the transmission facilities, especially during the implementation of the 1996 Act—Section 251 and other sections—were under Title II.

Folks often point to a GTE—the GTE ADSL order of 1998 as well, saying, aha, that was the FCC classifying internet access as a telecommunications or Title II service.

That's not the case. The FCC did not reach that conclusion. That was about a tariff, again, of the underlying transmission component of DSL or ADSL services by GTE at the time.

So there is a lot of confusion. It gets very technical very fast. Both legalese and engineering involved. But suffice it to say that internet access services have never been classified as common car-

riage. They have always been classified as an information service, or in the old days we called those enhanced services.

Mr. LATTA. OK. In my last minute, what concerns did you have about the 2015 rule's so-called general conduct standard and are there consumer-friendly services that could be prohibited under that standard?

Mr. McDOWELL. So the general conduct standard in the 2015 Title II order allowed the FCC to basically roam around the internet ecosphere so long as it could tether its decision to broadband.

It was certainly untested in the appellate courts, but it was very open ended. I think it would have led to a lot of appeals, and keep in mind that, you know, Title II—just Sections 201 and 202—have been appealed in the courts hundreds of times and within the FCC thousands of times.

And so that general conduct standard actually took the leash—Congress's leash off of the FCC's jurisdiction and would let it regulate as it saw fit until an appellate court put it back inside some boundary.

Mr. LATTA. Thank you very much.

And, Mr. Chairman, I have 10 seconds left. I will yield back my time.

Mr. DOYLE. Thank you very much.

I would just note, for the record, that all of the questions that the ranking member asked of Title II with the exception of the interconnection question was accurately answered by Commissioner McDowell except that those are all the sections of Title II that are not part of this bill. So, I would note that for the record.

The Chair now recognizes Mr. McNerney for 5 minutes.

Mr. MCNERNEY. Well, I thank the Chair. I thank the witnesses. It is a good hearing. It is a good subject.

My district does care strongly about net neutrality protections. When the FCC moved to repeal net neutrality, more than 8,000 of my constituents reached out to me to express their concerns.

So, I held a town hall meeting on net neutrality. I heard from a veteran. I heard from a librarian. I heard from students and I heard from a small business owner about their concerns what this would do to their—to their interests.

Mr. McDowell, thank you for your service as a Commissioner, as a chairman. You were an FCC Commissioner when the agency issued its first net neutrality enforcement action in 2008.

Is that right?

Mr. McDOWELL. That is correct.

Mr. MCNERNEY. Thank you. And you dissented from that action and issued a statement. Is that right?

Mr. McDOWELL. Correct.

Mr. MCNERNEY. I would like to—I have a copy of your statement. I would like to submit that for the record.

Mr. DOYLE. Without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mr. MCNERNEY. Mr. McDowell, I also have a copy of the dissent you filed when the FCC adopted the 2010 Open Internet Order. Can you confirm that you dissented?

Mr. McDOWELL. Yes.



Mr. MCNERNEY. All right. I would like to submit a copy of that for the record as well.

Mr. DOYLE. Without objection.

[The information appears at the conclusion of the hearing.]

Mr. MCNERNEY. And you sat down for an interview with the Wall Street Journal in 2017. Can you confirm that you sat for an interview on this subject in 2017?

Mr. McDOWELL. I may have. I don't—I had many interviews. I am sorry to say I don't remember the specific one you are talking about.

Mr. MCNERNEY. I understand.

Mr. McDOWELL. But for the—for the sport of it, yes. Let us say that.

Mr. MCNERNEY. But I have a copy of that and I would like to submit that for the record, without objection.

Mr. DOYLE. Without objection.

[The information appears at the conclusion of the hearing.]

Mr. MCNERNEY. So while I appreciate your willingness to engage on the issue and your suggestion that perhaps some rules are appropriate, I have to wonder whether you are truly interested in any safeguards to protect the free and open internet.

In 2008, you claimed that net neutrality issues may be better left to nongovernmental internet governance groups. In 2010, you said that net neutrality would cause irreparable harm to broadband investors and consumers.

In 2017, when talking about net neutrality you said it is hype. My constituents don't think it is hype. And the broadband market is competitive as is. It seems like the only time you have agreed with the Government actions on net neutrality was the FCC's 2007 order repealing protections.

Given your repeated opposition to net neutrality, it is hard for me to see that your critiques of our bill are anything more than a tactic meant to delay or halt efforts at giving Americans and my constituents critical online protections.

Mr. McDOWELL. Am I—can I address these other questions?

Mr. MCNERNEY. Sure. No, it's not a question but—

Mr. McDOWELL. OK. So—

Mr. MCNERNEY. If you can respond in 30 seconds.

Mr. McDOWELL. Real quick, in observance of your time.

So in 2008 that was an attempt to enforce the principles as rules and I objected on that basis—that they were not rules. The appellate court agreed with me and struck it back and turned it back to the FCC.

In 2010, I thought the FCC had overreached. You are right. I didn't think that rules were necessary because there were other laws already on the books that I talk about in my opening statement that gave us this wonderful internet ecosphere that we enjoy today.

But I also thought the FCC overstepped its bounds and didn't explain itself well and the appellate court, largely, agreed with me regarding the 2010 order.

So in both of those cases, that is true. When it comes to today and having this sort of Damocles swing back and forth every two to four to eight years—and we have learned that surprise elections

do happen so we don't know what is next—can we get a bill through the House that would get 60 votes in the Senate? I think that is a big question for this committee today.

Mr. MCNERNEY. All right.

Thank you for your response to that.

Mr. Wood, what do you think about Mr. McDowell's critiques of past FCC efforts to give consumers' open internet protections?

Mr. WOOD. Well, he is, obviously, right that those attempts failed in court in 2010 and in 2014 but that was because those rules weren't grounded in Title II.

So, I think the Save the Net Act neatly solves that problem by permanently grounding the rules in the right part of the law and doesn't leave it prone to challenges from ISPs like Comcast and Verizon who went in and sued and had those rules knocked down.

I also don't see the Sword of Damocles that he is talking about because, as Mr. Green testified and his research shows, investment has trended along just fine.

Mr. MCNERNEY. Well, I am going to follow up on that a little bit. Would you—would the proposed legislation give ISPs both large and small certainty in opening up investment?

Mr. WOOD. I believe so yes. I think that is what the record shows. They have continued to invest on the same path and trajectory that they did before 2015 during the Title II period and then since it has been repealed.

Mr. MCNERNEY. Do you have any estimates for how much investment might be—have been made?

Mr. WOOD. Well, I mean, the last page of our written testimony has some current aggregate figures. It tends to be, on the aggregate, about \$70 or \$80 billion a year. But we think those figures are actually somewhat uninformative because we look at individual companies and we see that they are investing at about the same percentages they have been for the past decade or more.

Mr. MCNERNEY. Thank you.

All right, Mr. Chairman. I give you four seconds.

Mr. DOYLE. I thank the gentleman.

The Chair now recognizes the full committee ranking member, Mr. Walden, for 5 minutes.

Mr. WALDEN. Thank you very much, Mr. Chairman. Again, thanks for this hearing.

Mr. McDowell, a quick question for you. Would Section 201 allow the FCC to do basically everything Mr. Latta asked you that could be done?

Mr. MCDOWELL. Section 201 is a very powerful statute that has been litigated both administratively and in the appellate courts many times and the power of 201 is very broad and powerful.

Mr. WALDEN. So the FCC could, basically—the questions Mr. Latta asked?

Mr. MCDOWELL. Yes 201 and 202, by the way. It's a necessary cousin as well. Yes.

Mr. WALDEN. Necessary cousin. That is an interesting phrase.

And so this legislation would not preclude the FCC from using its Section 201 and necessary cousin 202 to engage in all the things Mr. Latta expressed?

Mr. MCDOWELL. Not in my opinion.

Mr. WALDEN. They could do a rulemaking and do that?

Mr. McDOWELL. That is what it appears.

Mr. WALDEN. OK.

Mr. Green, I am curious about Fatbeam. Are you principally a business-to-business internet service provider?

Mr. GREEN. Thank you for asking—thank you for asking the question.

We do deliver indirectly—directly and indirectly residential services as—

Mr. WALDEN. So what percent of your business is residential versus business to business? Because I was looking at the website and it really seems to be marketing more to business-to-business, schools, hospitals.

Mr. GREEN. Yes. I would say that probably less than 12 percent of our—

Mr. WALDEN. Less than 12 percent is residential. So very little of your business would actually fall under the Title II regime then, right?

Mr. GREEN. Not necessarily. We have edge providers and other providers that would lease facilities from us.

Mr. WALDEN. So but the edge providers aren't covered under Title II?

Mr. GREEN. They are not.

Mr. WALDEN. Do you think they should be?

Mr. GREEN. I am sorry?

Mr. WALDEN. Do you think they should be?

Mr. GREEN. They should not be.

Mr. WALDEN. OK. So it is okay for them to throttle and block and do that sort of activity that they do as part of their business plan?

Mr. GREEN. They have a different set of rules that they operate under.

Mr. WALDEN. Yes, they do, don't they?

Mr. GREEN. Yes.

Mr. WALDEN. Yes. And so then I want to go to Mr. Wood's testimony, which I have been through, and I see you spent a very—incredible amount of time trying to rebut the witness we had from my district the other hearing, Mr. Franell, on Page 25 and all.

And so we had the opportunity last night to share your testimony with Mr. Franell. When did you—did you reach out to Eastern Oregon Telecom?

Mr. WOOD. No. After the hearing, we published a piece about that, and I understand—

Mr. WALDEN. Right, but my question—it is a simple question. Did you email them? Did you talk to them?

Mr. WOOD. No. We relied on public and news reports about investment at the time—

Mr. WALDEN. Right.

Mr. WOOD [continuing]. And FCC data as well.

Mr. WALDEN. Yes. That's why I was concerned about your testimony and why I raised the issue about, you know, how witnesses should behave here because Mr. Franell's testimony—he sends the letter and I want to read from it, just part, and I will submit it for the record without objection, Mr. Chairman.

Mr. DOYLE. Without objection.

[The information appears at the conclusion of the hearing.]

Mr. WALDEN. He says, in part, he goes through what really happened here in detail and I will make sure you see it, because he basically rebuts what you are saying and says, "Mr. Wood's assertions are, simply put, ill-informed and, unfortunately, tell a story far different," and then in parentheses "and not accurately from the one that actually occurred here in eastern Oregon. Had Mr. Wood simply picked up the phone or emailed I would have helped him so that his testimony could be a complete representation of the facts."

And he points out that his deployment was limited in scope to a lack of available cash, "ultimately only resulting in us building out to about 700 homes in Hermiston. The loan we secured to do the build was obtained prior to the Open Internet Order and had to be guaranteed by Umatilla Electric Co-op. Sadly, the project scope that we had hoped for was significantly limited due to a lack of capital."

And then he said in response to Mr. Wood's second bullet on Page 25 of his written testimony, "We obtained a cable system at zero dollars through RFPs from Boardman, Hermiston, Umatilla in unincorporated areas in northwest Umatilla County as they had been abandoned by their previous owner. We originally activated them with DOCSIS 2.0 cable modem termination system—CMTS—bought on eBay. They allowed us to provide download speed up to 30 megs. We upgraded the system to 3.0 systems in 2016 using Huawei-distributed CMTSs using cash organically generated. This new and extraordinarily cost-effective upgrade now allows us to offer speeds up to 100 megs to home."

And so there is more to this story than what your testimony gives this committee and it is, I think, unfortunate that you didn't actually reach out and do the rest of that—of that look.

Mr. McDowell, so for what part of the internet's life and flourishing occurred under the Wheeler order of net neutrality?

Mr. MCDOWELL. Well, most everything up until February of 2015. So pretty much everything we know today.

Mr. WALDEN. And then that order was repealed when?

Mr. MCDOWELL. That order was voted on December 14th of 2017. I think it became effective last summer.

Mr. WALDEN. So,—and I know I am out of time, Mr. Chairman—but, basically, two years of the internet's lifespan was under the Wheeler order?

Mr. MCDOWELL. Yes. The internet was not born in February of 2015.

Mr. WALDEN. I yield back.

Thank you.

Mr. DOYLE. I thank the gentleman.

The Chair now recognizes Mr. Loeb sack for 5 minutes.

Mr. LOEBSACK. Thank you, Mr. Chair. I do want to thank Chairmen Doyle and Pallone, Ranking Members Latta and Walden, for having this hearing today and I thank the witnesses for their participation as well.

Net neutrality, obviously, is a very important issue with this committee—I think for the country, and I am really glad that we are taking action today or at least beginning that process.

As a representative of a rural district, I think net neutrality comes down to being pretty similar to many of the challenges that face rural Americans. That the challenge of access as much as anything.

Rural Americans, I think, are often left behind when it comes to access to infrastructure and having many of the same opportunities as those living in the coasts—on the coasts or in urban areas. I know that is a constant refrain from me here on this committee and others on this committee as well.

I have been a constant advocate before this committee for rural communities—in my southeast Iowa district, about 12,000 or so square miles—it is very rural—and broadband in particular, because expanding access for all Iowans is one of the biggest challenges for my district as it is for many of the folks—districts of the folks on this committee.

And the hard truth is that for many of my constituents it is not a question of where is service is being throttled or blocked but whether there is reliable service, if any, at all.

And so that is a really important aspect of what I am interested in is just making sure that we have the services and access to good quality service across my district and open internet principles I think are an important part of that conversation as we consider the larger tech and internet environment facing us out there.

Our responsibility is to make sure that Americans have reliable service everywhere and we do need to make sure that that access isn't being unfairly blocked or slowed down or degraded.

So, I do want to turn to some questions and I apologize. I had to step out briefly. So, I thank my friend. Mr. McNerney may have addressed the issue of investment and I apologize for not being here to hear your answers.

But I do want to talk about that because, you know, we have talked about the time frame here when we had the Open Internet Order, when it was repealed, when it—when the repeal went into effect and then where we are now.

When it comes to investment, Mr. McDowell, how did the Open Internet Order affect investment? And I really would like you to be specific about that as well.

Mr. McDOWELL. Absolutely. So if you look in the record of the FCC, filings made by the Wireless Internet Service Providers Association—we call them WISPs—and these are often mom and pop operations in rural areas including in Iowa, about 80 percent of their members, they said in comments to the FCC, had trouble getting financing or loans.

I am delighted Mr. Green's company hasn't had that problem, and so there may be better cases than others. But for these, these are the smallest of the small ISPs and—

Mr. LOEBSACK. And when specifically did this happen and for what length of time?

Mr. McDOWELL. From the time of the Title II order in 2015 onward that they were having trouble raising money, because they would get questions. Same with the American Cable Association—ACA. They filed in the record that there were many of their members having trouble getting financing—

Mr. LOEBSACK. And did you say—

Mr. McDOWELL [continuing]. As well as municipal broadband companies.

Mr. LOEBSACK. Did you say it was a survey of the small providers, that you said 70 or 80 percent of them are having trouble?

Mr. McDOWELL. So that is the WISPA said about 80 percent of their members were having trouble.

Mr. LOEBSACK. And that was a survey that was done on them. Is that correct?

Mr. McDOWELL. Right. And then——

Mr. LOEBSACK. And when was that survey done, specifically?

Mr. McDOWELL. After the Title II order.

Mr. LOEBSACK. But can you tell me when specifically?

Mr. McDOWELL. Between 2015 and into 2017 when the FCC was collecting comments.

Mr. LOEBSACK. I am sorry. I am a former social scientist, so I like to be precise about when things were done.

Mr. McDOWELL. Yes.

Mr. LOEBSACK. If you could provide that information to me in writing that would be fantastic because I would like to know those specifics.

Mr. McDOWELL. In the FCC's records. I would be happy to get it for you.

Mr. LOEBSACK. That would be great.

Mr. McDOWELL. Same with the ACA filing. Same with the 19 municipalities that said the same thing. Same with the independent Wall Street analysts who really have no dog in the fight. They said the same thing, that this is affecting—mainly because there are so many questions being asked.

Mr. LOEBSACK. Right.

Mr. McDOWELL. And I—you know, part of what I do is I help investors understand Washington, which is no easy task sometimes——

Mr. LOEBSACK. And I will——

Mr. McDOWELL [continuing]. And then other questions I would get or got——

Mr. LOEBSACK. I really hate to cut you off, but I have a limited amount of time. I got to ask some other folks.

Mr. McDOWELL. OK. Sure.

Mr. LOEBSACK. Thank you so much.

Mr. Green, would you like to respond to that?

Please do.

Mr. GREEN. Yes. We have not had any difficulty. In fact, we have had great success in terms of getting financing. I would say that the stability of net neutrality in 2015 even helped more.

Mr. LOEBSACK. Right.

Mr. GREEN. I would view it in that—in those terms, if I could.

Mr. LOEBSACK. Yes. Thank you.

Mr. GREEN. I don't know if that's specific enough for you.

Mr. LOEBSACK. And maybe you could give me some specifics in written form, if you would, and I have 17 seconds left.

Mr. Wood, I would like you to answer that question, too, and then whatever more you would like to say beyond the time here I would like to see that in writing and respect the rules of the committee here.

Mr. WOOD. Sure. But we do have some of that information in our written testimony. We had some in our previous testimony, too.

I don't think there are very many specifics in what Commissioner McDowell gave you, with all due respected. WISPs said they had trouble getting financing.

What we look at and what we looked at for Eastern Oregon Telecom and also 5 other ISPs who came to the FCC in December 2017 and said that they had had trouble as well as we look at their deployment data that they file with the FCC and we look at the investor reports that the publicly-traded providers make to the SEC.

What we see there are companies basically investing at the same level. Sometimes they go up. Sometimes they go down. But that is because of their upgrade cycles, not because of any impact of the rules.

Mr. LOEBSACK. Thank you, Mr. Chair, for indulging my going over the time.

Mr. DOYLE. I thank the gentleman.

The Chair now recognizes Mr. Shimkus for 5 minutes.

Mr. SHIMKUS. Thank you, Mr. Chairman.

It is great to have you all here.

Mr. Green, I just want to make a point. I did—a colleague one time—one time I had a colleague and we voted differently. Then he went on to explain to the media why he thought I voted the way I did.

Obviously, I went to meet with him on the floor and I said, "I will define how I would vote, not you." I would caution you to comment in direct analyses of other people's business models and when the small providers in my district think that this is going to be harmful.

And that is just a cautionary note because speak to your own business model. Don't speak to any other business model that you may or may not know who they are serving, how they are serving, and why they are serving it.

Mr. GREEN. Duly noted. Thank you.

Mr. SHIMKUS. Mr. Wood, we talked last time and I brought up—so Adam Kinzinger, our colleague here, is a National Air Reserve pilot. Flew two weeks on the southern border.

My friends on the Democrat side want smart technology on the wall at the southern border. Part of that is National Guard deployment and that is kind of what Adam was doing.

The panel last week all agreed with Mr. Wheeler, who highlighted in his order that that ensured the protection for smart wall protections. All but one witness in the last panel, which was you and your—and the Free Press Action were opposed.

I just want to give you an opportunity to correct the record if you are okay with that sort of prioritization since a smart wall is the proposal from my friends on the Democrat side.

Mr. WOOD. Thank you, Congressman.

I think if I remember the question, it was about whether we supported two things—funding for a wall or for somebody to sort of—

Mr. SHIMKUS. No, it was on smart wall technology and prioritization.

Mr. WOOD. Right. So the answer on prioritization—to stay away from the wall for a second—is that prioritization—

Mr. SHIMKUS. Well, it is kind of defined the same. I mean—

Mr. WOOD. Right. Well, as I talked about last year—

Mr. SHIMKUS [continuing]. That is part of the debate of—part of it is the smart wall.

Mr. WOOD. Right.

Mr. SHIMKUS. Smart technology, using electronics and so I don't want to—

Mr. WOOD. But what I testified to last year, sir, was that prioritization of public safety services is allowed. I don't know if the question was posed in a way that got people to answer with their opinions on the wall. We don't support the building of any wall—

Mr. SHIMKUS. No, I am just talking about the smart wall technology on the wall. So you—

Mr. WOOD. So under the 2015 rules, prioritization of public safety services is definitely allowed. What's not allowed is charging the public safety services for that privilege.

Mr. SHIMKUS. So you—so I think, if I hear what you are saying is, prioritization for public safety is allowable.

Mr. WOOD. That is not defined as paid prioritization under the rules.

Mr. SHIMKUS. Well, it is prioritization.

Mr. WOOD. Right. The paid part—paid is an important word there, sir.

Mr. SHIMKUS. It is prioritization.

Mr. WOOD. That is right.

Mr. SHIMKUS. OK. Thank you.

Mr. WOOD. It could be if it is necessary.

Mr. SHIMKUS. It is paid. It is prioritization.

Let us go back, and I just do this because Anna Eshoo and I, we are really in the 911 space. This is not broadband, but this is FirstNet—FirstNet's premise is based upon prioritization. Companies use a system and then if their—the answer is this and if there is a need they push everybody off to allow first line responders to use that.

Let me go to Mr. McDowell.

Search engines provide content to consumers on the internet. When a consumer searches for content, do search engines prioritize the ads that are served to the consumers based upon paid prioritization?

Mr. McDOWELL. They do. It is an algorithm. Yes. Absolutely.

Mr. SHIMKUS. So this is—to Mr. Wood's word, this is actually where paid prioritization occurs?

Mr. McDOWELL. There is paid prioritization all throughout the economy and is actually—it can be very efficient.

Mr. SHIMKUS. So in your—

Mr. McDOWELL. And consumers want it, in many cases. It is anti-competitive paid prioritization. That is the problem. So, we shouldn't conflate the two, all right.

Mr. SHIMKUS. So in your communication and conversations—I was down for the Health Sub gavel—to Mr. Walden, you said edge providers play by a different set of rules.

Mr. Green, so what are those different set of rules?



Mr. GREEN. Well, first of all, thank you for the question.

First of all, the provider—as the infrastructure provider and ISP, we are transport——

Mr. SHIMKUS. No, I am talking about edge providers. This is your——

Mr. GREEN. Yes. I am here to respond. That is not what we do.

Mr. SHIMKUS. No, I know. But you—so, I want to know what—since you know edge providers play by different rules—I mean, that is your statement you just made—what are they?

Mr. GREEN. Correct. I am not an attorney. I don't make those rules.

Mr. SHIMKUS. But you are the one who said edge providers play by different rules. So what are those different rules?

Mr. GREEN. So the rules are different. We are a—okay.

[Laughter.]

Mr. SHIMKUS. OK. I got that.

Mr. GREEN. Yes. Yes. We are a communication——

Mr. SHIMKUS. Mr. Chairman, my time has expired.

Mr. GREEN. OK. Thank you.

Mr. DOYLE. They are governed under a different set of rules than ISPs are is what I think he was——

Mr. SHIMKUS. Well, if you will allow me to respond. He is the one who defined that and then he wouldn't answer the question.

Mr. DOYLE. I think—I think he responded appropriately.

OK. Who is next? The Chair recognizes Mr. Veasey for 5 minutes.

Mr. VEASEY. Thank you, Mr. Chair, and before I ask my questions I just want to clarify. I know that the gentleman that just finished asking questions said that he didn't want his thoughts interpreted wrongly.

And so I don't want us to call each other names on the committee, but I think he said Democrat Party, which is a kind Republican operative type word, and it is the Democratic Party.

So if he is going to refer to us he ought to refer to us correctly if he doesn't want his thoughts being interpreted the wrong way.

I wanted to ask Ms. Ochillo a question, because you mentioned the Lifeline program which I think is a very important discussion that needs to be had in this entire debate.

And when you start thinking about the Lifeline program and who it serves, which is a lot of the constituents in the district that I represent, I wanted to ask you, about 50 percent of Americans with households under \$30,000 have broadband and as a—as a good friend of mine that was very wealthy that has passed away now from Texas had said, if you make \$30,000 a year and you don't have to pay one cent in taxes, you probably—especially if you have kids, you probably still don't have any money at the end of the month.

And so I wanted to ask you how do you think that having this service disrupted in any way would undermine the routines of these families that make under \$30,000 a year? Because that is a big number.

Ms. OCHILLO. Yes, and thank you so much, Congressman Veasey.

I want to make sure that I frame the background to this because this is—forgive me, this is my first hearing and some of what hap-

pens the—maybe the tone of the dialogue—people in my home state they don't care about Democratic or Republican. They don't care about Title II or net neutrality.

What they care about is that they have access and that their families can apply for jobs online or that they can apply for scholarships to go to school so that they have a way out of poverty.

And then you mentioned the statistics. Just to give background, when you're talking about Latino communities, 30 percent of Latinos do not have access to broadband of any kind and when you talk about the non-English-speaking groups, that number even goes higher.

When you're talking about tribal groups, we have literally 60 percent of Americans who do not have access to any broadband. So when there are programs like Lifeline that are basically—their legal foundation is Title II and the FCC has an obligation to connect these disconnected people, that is life or death for some of them.

The Lifeline program in times of hurricane is what gives people a way out to actually get access to FEMA and make sure that they can fill out their applications for students. Sometimes it is the only way that they can access to broadband to do their homework. For some families, that is their only opportunity to connect, maybe to apply for jobs or to get healthcare.

So, it is so important that we fund not only just Lifeline but even start being more imaginative about the way that we connect people because Lifeline is not enough. But right now, it is the only program that is connecting people to telecom services.

Mr. VEASEY. Yes. No, thank you very much, and you mentioned something very important. Seven out of 10 children do their homework—need broadband access to do their homework.

My son is one of those students. He is in 7th grade and much of the homework that he does that's required and most of the kids at his school are on free and reduced lunch, they have to have this program.

I wanted to ask Mr. Wood a question. You know, one of the things that happened by the FCC chair was that he reversed a decision made by the previous chair that allowed nine new providers of Lifeline into the program.

Of course, most of the people that offered this Lifeline they are resellers. They are not a lot of the big companies that we know about.

Can you please just sort of touch on, very briefly, by taking the competition out by the current chair—removing the competition and making it harder for these new providers to—or resellers to provide Lifeline—what that has done to the entire program and what it has done to undermine it?

Mr. WOOD. Yes, sir. Thank you for the question. I think that is a great follow-up to the last one.

As you said, one of the consequences of this FCC's fight against Title II and the sound basis it provides for Universal Service was that they tossed out of the Lifeline program nine providers who are either already providing or willing to provide a broadband-only service.

And so what they have done is by getting rid of Section 254 and also swearing off Section 706 of the Telecom Act as the source of authority they have said, well, if existing providers—if the existing phone company wants to provide broadband, that is fine.

They can use USF money for that. They really have no way to require them to provide that service and in fact, as you noted, when a company wants to only provide broadband and not a telephone service, historically, they may not even be eligible for that Lifeline or any other Universal Service funding.

So, we think that is a problem for keeping out new entrants and innovation.

Mr. VEASEY. Thank you very much.

Mr. Chair, I yield back.

Mr. DOYLE. Thank you.

The Chair now recognizes Mr. Olson for 5 minutes.

Mr. OLSON. I thank the Chair, and welcome to our witnesses. A very special welcome to Chairman McDowell. My wife, who I have been married to for 25 years, is a Duke Blue Devil, and just like you, she will never buy another pair of Nike shoes because our star—his shoes blew apart—Zion Williamson—against their arch rivals, North Carolina, 30 seconds into the game.

Mr. MCDOWELL. They will be back. Don't worry.

Mr. OLSON. OK. That is off my chest.

I am very concerned about returning to the so-called Wheeler Title II rule. We keep playing ping pong with net neutrality, just back and forth, back and forth, back and forth. That means the market is unstable, it is unsure, and, sadly, the majority party had little outreach to us on our side of the aisle, which means this bill will die—in the Senate. It is dead.

And so this is just plain messaging and the people who use it need real rules. They need this thing to work. But, again, I don't think it is going to happen with this bill.

My question is for you, Mr. McDowell. In the Title II order, the FCC, led by Chairman Wheeler, recognized that sponsored data programs are pro-consumer because they allow consumers to watch and listen to their favorite content without being charged for data.

All right. But the FCC also put them under the, quote, “general conduct standard,” end quote, and opened quote, “bureau investigations,” end quote, in the companies who offer these pro-consumer plans under the vague general conduct standards.

How does the threat of these investigations impact a company decision looking to innovate with the internet?

Mr. MCDOWELL. So what that does is create an atmosphere of what we call ex ante regulation, which is before the facts, or “Mother may I.”

So before an innovator wants to do something they were having to go to the FCC to make sure it was okay to do that, other than, you know, just trying to experiment in the marketplace and say here is a sponsored data plan or zero rating and things of that nature, which are very popular with consumers.

So that slowed down innovation and the rollout of some experimentation that consumers ended up liking.

Mr. OLSON. And a follow-up to that question. Since the FCC restored the long-standing Title I classification in May of 2017, ISPs

are no longer being scrutinized for every pro-consumer innovative offering they might introduce to the market.

What innovations do we have now today that we might not have had we let the general conduct standard still be in effect? And specific examples of what this bill may do, once again?

Mr. McDOWELL. So what is interesting about this debate is sometimes we don't know what does not make it to market because it didn't make it to market, right?

So now we do have an environment where there can be experimentation in things like zero rating or sponsored data so long as it is not anti-competitive, and I think the word anti-competitive has to be part of this conversation because there is the Federal Trade Commission Act, the Clayton Act, the Sherman Act, common law tort law, common law contract law, and other things.

If there were violations of any of those, there would be investigations by the Federal Trade Commission and there have been some over the years in this space.

So it is important to make sure when we talk about either discrimination or the offering of services, is it competitive or anti-competitive, is it pro-consumer or not, and that is really the litmus test.

Mr. OLSON. Any specific examples of how a business might have stepped out because of concerns about the Wheeler rule, just all these things—

Mr. McDOWELL. So there were some offerings such as Binge On by T-Mobile, which was held up for a while while the FCC investigated and that is now a thing in the marketplace—a very popular service offering—which is not anti-competitive. It is pro-competition. It is pro-consumer and consumers seem to love it.

Mr. OLSON. And competition drives prices down, encourages innovation, and just good, good, good. The free market works, works, works.

Mr. Chairman, I will bank 45 seconds.

Mr. DOYLE. I thank the gentleman.

The Chair now yields to Mr. McEachin 5 minutes.

Mr. MCEACHIN. Thank you, Mr. Chairman, and thank you for pulling this hearing together today.

Mr. Chairman, as you know, I am a new member on this committee. I am also a forming lawyer, and what that means or what I hope that means is that I am not necessarily burdened by the knowledge of the past since I wasn't here for a lot of it. But I am also intrigued by the past.

And last month, Chairman Wheeler really captured my imagination and my attention when he discussed the fact that we really dealing with 600 years of English common law or English jurisprudence—600 years—of that if for some reason some of my friends here on the other side of the aisle want to just toss it out of the window and forget it ever happened.

Mr. Wood, based on building on Mr. Chairman Wheeler's testimony, would you please speak to the points of common carrier protections to the openness of what is the most powerful technology in this era?

Mr. WOOD. Certainly, Congressman. Thank you for the question.

I think you are exactly right. Common carriage law is a time-honored tradition, but it is one that is still vital. I think the big difference that we are not hearing about so far in this hearing is the difference between common carriage law and antitrust law or other consumer protections statutes, and that is that common carriage law and the Title II foundation for the net neutrality rules that we look to restore here protect everybody's speech on the internet.

So a common carrier cannot discriminate against their individual users and they are not just prohibited from interfering with competition but with any free and open use of the transmission capacity that they sell.

And so that is why I think it is true that, yes, the big edge providers do play by a different set of rules, as we have heard, but they are speakers. They are publishers. They are aggregators. They are users on the edge of that common carrier network.

There could be some debate to be had about which of those companies are transmitting speech. I don't think we have the answer to that right now. But what we do know is we need common carriage law to preserve that open transmission pathway that we have had for decades and even centuries on many of these infrastructures you are talking about.

Mr. MCEACHIN. Thank you. And as a follow-up, how does the Save the Internet Act ensure the important aspect of common carrier law are kept in place while many of those that need to be omitted because they are outdated?

Mr. WOOD. Well, it does that, sir, by restoring the provisions that the FCC kept in the 2015 order and that does include Title I—excuse me, Section 201 and 202—what we said the necessary cousins. Is that the phrase we are using?

I wouldn't say those are—that is a bad thing. For me, that is a feature, not a bug. I don't think most internet users or most of your constituents are worried about Comcast's hands being tied or AT&T's or Verizon's.

What they want is somebody to be able to step in and act as a watchdog when a company does abuse those kinds of privileges that they can take under the current lack of any rules.

And so you talk about zero rating. In my testimony, I cite examples of research saying that zero rating actually makes costs go up for wireless users. There may be no such thing as a free lunch, and when these wireless companies say we will put a data cap on you but then we will exempt you for some of those purposes, that, to us, doesn't sound like a great deal.

What we have seen in the market since the 2015 rules came into place, not just because of them but thanks to them and thanks to other developments, as we've seen, a return to unlimited data on wireless programs and wireless carriers service offerings.

So, we actually think that giving people the data they pay for and letting them use it for what they want is a good thing and not something to be worried about. In fact, it is exactly what we all need.

Mr. MCEACHIN. And I thank you for that and thank you to all of our witnesses.

Today's high-speed internet services are intimately tied to social mobility, economic quality, and community growth. As such, we must ensure that access to internet services remain open and not dependent on one's ability to pay.

The Save the Internet Act does just that. I look forward to it becoming law.

Thank you, Mr. Chairman, and I will yield you a whole minute, Mr. Chairman.

Mr. DOYLE. I thank the gentleman.

We will now recognize Mr. Flores for 5 minutes.

Mr. FLORES. Thank you, Mr. Chairman. I appreciate the witnesses for joining us today.

In a letter that I would like to submit for the record, the chairman of the Vermont Telephone Company, or VTel for short, notes the very direct connection between its investments and the light touch that the FCC reinstituted in 2017 and that VTel would not have made the decision to invest millions of dollars on Ericsson 4G and 5G upgrades in the absence of restoring internet freedom order.

Mr. DOYLE. Without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mr. FLORES. Thank you, Mr. Chairman.

Mr. McDowell, Ms. Ochillo talked about the digital divide and I am glad you brought that up.

Mr. McDowell, what impact would Title II classification have on broadband investment when it is needed most to close the digital divide?

Mr. McDOWELL. Well, as we have seen and we can debate, but as we have seen in the FCC's record and the record of the hearing here a few weeks ago as well as today, there are a lot of rural carriers, in particular—not that this is just a rural issue—who felt as though their ability to raise revenue to build out for mainly residential consumers was impaired by the Title II regime.

But, overall, let us keep in mind that the FCC has an \$8 billion Universal Service Fund and under that umbrella are a lot of other funds and Lifeline was one that I defended vociferously when I was at the commission. I was worried about its fiscal long-term health in 2012.

But we also expanded the support of Universal Service to broadband to advance services which, by the way, Section 254 allows for, and I know if Congressman Pickering were testifying today—because he helped write 254—he would agree with that.

So in the fall of 2011, we actually had a unanimous bipartisan decision, the only one of its kind in FCC history to expand Universal Service support to broadband and, ultimately, to the Lifeline recipients as well.

So that is a huge component of this. Sometimes the market does not work for everybody and that is what the Universal Service Fund is there to do.

Mr. FLORES. Continuing on this subject, Mr. Wood's written testimony claims that just because small providers continued to invest in their networks while Title II was in effect that Title II did not hurt them.

The challenge with that is that these investment decisions are made far in advance. How far in advance do you think these decisions are made?

Mr. MCDOWELL. They could be sometimes years in advance. But, and again, I am going to enumerate—I dug through my folder here—there is Gigabit Minnesota, there is Shentel, there is Schurz, there is Sjoberg's, there is CATV Telecommunications.

There are a lot of smaller outfits who filed in the FCC's record saying that Title II impaired their plans. There are far more smaller companies—ISPs—that said that than others.

Mr. FLORES. That is right, and I appreciate you helping us make sure we have a holistic record of the investment decisions that were made when Title II was—when the 1930s-era statute was slapped on the internet.

And that is important to me because about 90 percent of the land mass in my district is rural and I care about closing the digital divide. I would like to see rural America have just as much access to capital and technology as my constituents do that live in urban and suburban areas.

And it is unfortunate that we are having a messaging bill today instead of one of the three bills that would actually solve the issues that have been complained about and that is the blocking and throttling and paid prioritization.

And so this bill has no chance of passage and so I think we would be better spending our time on something else.

During our hearing a few weeks ago, I had the opportunity to ask former FCC Commissioner Powell about the possibilities of further Government intrusion under a Title II regime. Chairman Powell shared my concern that under Title II the Government could eventually set prices or direct investment decisions of private entities.

Looking at the bill that we have before us today, Mr. McDowell, could some—has the Democrat proposal that we have before us have they safeguarded against these possibilities of changing prices or regulating prices or investment decisions?

Mr. MCDOWELL. I am sorry. Could you repeat the question?

Mr. FLORES. Yes. Let me—let me rephrase it. The Democrat proposal today, is it safeguarding against the ability of the FCC to set prices for internet services or to direct the investment decisions of private entities?

Mr. MCDOWELL. The concern with inviting the Title II beast into your tent is even if you only have a few claws of it in the tent it is a pretty big and strong beast.

I am an attorney in private practice. I think there would be tons of appellate work. I should be all for this, selfishly, but I am not because I know that there will be tons of appeals.

But let me say something real quickly, if I may, that is counter cultural, which is actually I have faith in this Congress. I have faith that you can find common ground on this issue.

I don't think this is the bill for it. But I think you can do this, and you can find 60 votes in the Senate, and I am not just being naive saying that.

Mr. FLORES. Well, and I agree with you and this committee has a long history of bipartisanship. This bill is not that.

So thank you. I yield back the balance of my time.

Mr. DOYLE. I thank the gentleman.

The Chair now yields to Mr. Soto for 5 minutes.

Mr. SOTO. Thank you, Chairman. I want to start by having everybody take a deep breath and exhaling. I know the stakes are high but, you know, let us start by a perspective and what this bill is, which is an opening offer as we negotiate these very complex and important rules.

We are going to conduct hearings, yes, more than one. This is the internet. So, I think we could have even a half a dozen hearings and that may not be sufficient about the information we need to get.

We will have a markup so this bill is not just messaging. It will be an opportunity for amendments. I, for one, am open to amendments and we have heard some good ones here today.

The Senate appears open to negotiate after passing a similar CRA. So this idea that there is no chance of passage is also not true. We were asked by the public to create basic net neutrality rules and this bill is a start to doing that.

In addition, we were asked by industry to create a new chapter and this bill will create a new chapter. Don't you think the internet deserves its own chapter? I mean, it is so all-encompassing.

And then we were asked to make sure there was some parity between the ISPs and edge providers and this bill does that through memorandums of understanding and that was sort of a confusion. So, I want to clarify what our staff has explained.

By reinstating the 2015 that applies Section 201 and 202 of the Communications Act that creates a standard to prevent unjust and unreasonable and discriminatory network practices. This would apply to everyone—edge providers and ISPs. Those were two recommendations from business in the space that we are on the road to meeting.

But I want to get some consensus on some of the things this bill does. By a show of hands, how many of you are opposed or believe this bill should give FCC regulation over blocking?

Raise your hand if you believe that the FCC should, under this bill, be able to stop blocking? Raise your hand.

Mr. WOOD. Blocking by regulated entities, sir. But yes.

Mr. SOTO. OK. And how many of you believe the FCC should have the authority to regulate throttling? Raise your hand. Raise them a little higher. Come on, everybody.

Mr. McDOWELL. You're saying under this bill. Is that right?

Mr. SOTO. Under this bill.

Mr. McDOWELL. OK.

Mr. SOTO. OK. How many of you support the FCC having the ability to stop paid prioritization? Raise your hand if you support that. OK. How many of you believe there should be FCC investigatory power for consumer and business complaints given to the FCC? Raise your hand.

OK. And fines for violations? Raise your hand.

Thank you. I want to personally thank the chairman for reviving FCC authority to fund rural broadband and Lifeline. That is important for areas of my district like south Osceola County and Polk County that, obviously, are really important.



There are a series of concerns that Congressman Latta brought up which I think we do need to hash out. Mr. Doyle has already said that setting prices and rates, dictating capital investments has now been part of the bill—is now part of what the intent of this bill is.

So, Mr. McDowell if we explicitly put in place exclusions saying that the FCC shouldn't be setting pricing arrays or dictate where ISPs or edge providers have to put in their capital, would that make the bill more palatable, in your opinion?

Mr. McDOWELL. I wouldn't be able to endorse it. I think this Congress can do better than that. I think we can do better than relying on Title II. I think the internet, to your point, deserves its own chapter and Title II is not the internet's chapter.

Mr. SOTO. But you do agree this isn't the old telephone company model where people have a monopoly and we would need these pricing rates and that it would greatly improve the bill if there were—if we were explicit in these two areas?

Mr. McDOWELL. If the intent is to fashion something new, then let us fashion something new. But taking a couple of piece parts of Title II isn't the way to go.

Mr. SOTO. I would like to give each of our other witnesses—give us one suggestion you would like to see in the bill, starting with Ms. Ochillo.

Ms. OCHILLO. If I were to add something to the bill, I would like to see that the FCC had some sort of obligation to actually disclose how their—how effective their Universal Service programs actually are. So, they should have an obligation to do so as well as to actually create incentives for deployment explicitly.

Mr. SOTO. Thank you.

Mr. Green.

Mr. GREEN. Not some but all protections.

Mr. SOTO. OK. Mr. Wood?

Mr. WOOD. I don't think, Congressman, there is anything to add because we supported the 2015 rules and we don't think, as I said in my testimony, there are people who do face a monopoly today.

But we do have a long track record under Title II with wireless voice and business broadband services where there was not after the fact rate regulation for more than two or three decades now at the FCC.

So, we don't really think that is a realistic danger or one that your constituents should fear or would look askance at.

Mr. SOTO. Thanks. My time has expired.

Mr. DOYLE. I thank the gentleman.

The Chair now recognizes Mr. Walberg for 5 minutes.

Mr. WALBERG. I thank Mr. Pallone and thank you to witnesses for being here.

A little over one month ago we sat here in this room, as has been noted, discussing net neutrality. Here we are again and already over the half of the hearings I have attended on this subcommittee have dealt with net neutrality and it is only March.

The last time around, my Republican colleagues introduced three net neutrality bills to kick off discussion on a potential legislative solution that would preserve congressional prerogative over agencies to which it delegates authority.

And, unfortunately, it looks like we are going the opposite direction—truly back to 1930s or Ma Bell-type-regulation that I am old enough to remember.

I am glad we are past that, in most cases. As legislators, Congress must be clear about what authority the FCC has and does not have when we think they failed. This seems to be a clear case where Congress must cut through the uncertainty that is hampering broadband investment in places like my district—a rural district—and not rubber stamp an old commission's decision.

Codifying existing commission action doesn't seem to be a serious attempt to legislate this issue as the title of this hearing suggests and falls short of delivering the expectation of a free and open Internet our constituents desire.

I expressed my willingness last hearing to work across the aisle on this issue and I remain willing to have that discussion today. But while I respect the commission as an expert technical agency over communication issues, I firmly believe that ultimately Congress needs to provide the certainty and clarity that consumers demand.

Mr. McDowell, you refer in your testimony to some legislative efforts as zero-sum, implying that in order for one faction to win others must lose. Can you explain what parts of this debate are not zero sum?

Mr. McDOWELL. And, sir, my testimony is referring mainly to the regulatory actions at the FCC.

So, Title II does bring uncertainty. It does bring uncertainty to the investment community, to analysts, to the folks making the loans, to Internet service providers. That's just a fact. That is just the case.

So that becomes zero sum. So when you bring in Title II and whether the intent is to have the specter of rate regulation or not in this particular bill, there will still be questions about that because lawyers will get paid to find the maximum path forward of that language as well as others on the other side to try to make it as narrow as possible.

So zero sum, when you start—it starts coming into play when you talk about Title II in this regard. I think that if you were to take Title II off the table and start with some principles, which I think everyone in this room shares—those core principles that I talk about in my testimony—then you have a chance at a large bipartisan majority to get through those 60 votes in the Senate so something could actually become law and last for decades.

Mr. WALBERG. And so following that up, does the bill before us today or any other net neutrality legislation like the bills introduced by Republican leaders Walden, Latta, or Rodgers incorporate features that are not zero sum that everyone has agreed on?

Mr. McDOWELL. So for you Star Trek fans, there is an old Vulcan saying that says only Nixon can go to China. So let me say this, which is the 2010 FCC order, I think there are many parts of that which—some of which are echoed in the Latta bill could be the nucleus for some successful legislation.

Mr. WALBERG. Can each of you down the line, starting with Ms. Ochillo, quickly answer if you think this issue is zero sum.

Ms. OCHILLO. I don't. I don't think is a zero sum. No.

Mr. WALBERG. Mr. Green?

Mr. GREEN. I don't think—

Mr. WALBERG. My time is running out.

Mr. GREEN. I don't think that it is a zero sum.

Mr. WALBERG. Mr. Wood?

Mr. WOOD. Yes. I am not sure that we all understand the question, sir, but I do think that this is a net positive is what I would call it. Setting the rules straight again and making it certain to people that they can say what they want online and see what they want online without interference by their ISP but, as my testimony shows, with no interference to broadband providers' investment decisions, despite what we have heard today.

Mr. WALBERG. And I would suggest if that is what we were doing I could agree with you, but I can't.

I yield back 90 seconds.

Mr. DOYLE. I thank the gentleman.

The Chair now recognizes Mr. O'Halleran for 5 minutes.

Mr. O'HALLERAN. Thank you, Chairman Doyle, and my colleagues on this subcommittee for continuing this critical conversation on how we can codify important bright line protections for consumers on the internet while promoting innovation in every corner of the internet ecosystem.

At our first hearing on this issue it was clear that broad support exists when it comes to making the principles, we all care about permanent.

Today, I look forward to examining the Save the Internet Act with that same spirit. Everyone on this committee understands the necessity for protecting access to broadband for our communities and our economy.

As I have previously said, I want to see a permanent solution that is enforceable, robust, and has lasting protections for consumers and our small businesses.

Mr. Green, as someone who represents an incredibly rural district, as I do—I know up in Idaho you have many of those same type of districts—I would like to thank you for your organization's work in serving rural communities in the western United States including some in Arizona with critical access to the internet.

In your experience, how are small businesses in rural communities impacted by a lack of certainty regarding net neutrality rules?

Mr. GREEN. Thank you for your question, Mr. Congressman.

I think that, obviously, the business that we are in is delivering service to a community that is requiring demand. Demand is creating this need. So, we are a for profit business. So I will start with that, to try not to take up your time.

But I will also say that as we build that business and enterprise network for your business communities, surrounding communities, for education, for economic development, we also provide connectivity in and out of that community so that you have access to the internet.

Let us just hope that one day a child, someone in college, someone working from home, will get a better education.

Let us hope that maybe someone, some young talented individual will create the next Netflix in a rural market that you live in and

you support like Netflix and that sort of, quite frankly, is really one of our goals.

Yes, we are for profit. We are a business. But at the end of the day, if the outcome is that a child can have the same access in your community that they can in New York, in any other markets in the United States, then we have done our job.

Mr. O'HALLERAN. There is nothing bad about for profit. I think that is a good way to invest in America and invest in the future of America.

But I guess I am coming from the perspective that there is a sentiment within our country that rural America is kind of—well, they are out there. We know they are out there.

But, you know, for them to participate is just going to cost way too much money. It is not going to get us where we need to be and, yet, at the same time we need everybody in the workforce up to the highest level we can as far as education.

We need good health services. We need people to fully understand the connection between our entire country, not just parts of our country at the same level. And I heard some discussion earlier about, well, you are mostly for businesses.

Well, if you get in to the communities in my area, and others can get links to you, then you are for everybody in that community and that is a critical element and that investment is important to each and every one of those communities.

Mr. McDowell, I agree with your statement that the time has come for Congress to provide clarity and certainty by enacting new legislation with regard to neutrality rules.

Now, I haven't been here for your entire testimony and you have brought up a lot of ideas and concepts that I would like to hear more about.

But I also have noted that a lot of what you have talked about is kind of, as they would say, in the cloud and not specific to how you personally would like to see this type of a bill address the issues that you do not agree to.

Mr. McDOWELL. Thank you, and first of all, happy early St. Patrick's Day to you.

Mr. O'HALLERAN. And the same to you.

Mr. McDOWELL. Thank you, sir.

So as a starting point, I want us to listen to the Supreme Court from 2005 when it talked about Title II reclassification. It said, quote, "Title II reclassification was subject to mandatory common carrier regulation of all information service providers that use telecommunication as an input to provide information service to the public," end quote. That's at U.S.—545 U.S. at 994. I think that is important.

Mr. O'HALLERAN. Mr.—I am sorry. My time is up and we will get back to it another time.

Mr. McDOWELL. OK. Thank you.

Mr. O'HALLERAN. Thank you, Mr. Chairman. I yield.

Mr. DOYLE. I thank the gentleman.

The Chair now recognizes Mr. Bilirakis for 5 minutes.

Mr. BILIRAKIS. Thank you, Mr. Chairman.

I want to talk like—again, I know some of the members before asked but I want to start again with this issue. Clearly, the FCC

needs congressional authority to prevent these huge swings of all—again, of all or nothing rule under the Title I or Title II.

If we are all in agreement that we must prevent blocking and throttling of service—and I think we are all in agreement—then let us codify those consumer protections and let us do it now in a bipartisan fashion. I believe that is what the people want, in my opinion.

What I am afraid of for my constituents is the open-ended forbearance that the 2015 order, H.R. 1644, puts in place.

Mr. McDowell, under the 2015 order, if the current FCC decides to forbear a particular Title II regulation, does subsequent FCC leadership have to abide by that decision?

Mr. McDOWELL. Under the 2015 order, no.

Mr. BILIRAKIS. No? OK.

Under the current law, internet users are protected from the Universal Service fee by statute. Is that correct?

Mr. McDOWELL. Correct, essentially. Yes.

Mr. BILIRAKIS. OK. Essentially. OK.

Florida greatly benefits from this protection so as we are already a payor. So, we are a payor state into the Universal Service Fund and do not receive—we don't receive our proportionate share of benefits. That is the case in a lot of matters, unfortunately.

Again, Mr. McDowell, if passed, would H.R. 644 remove this protection and potentially allow the internet to be subject to U.S.F. fees?

Mr. McDOWELL. So the 2015 order equated IP addresses—internet protocol addresses—with phone numbers. That not only had implications potentially for Universal Service—for contributions—I will call it taxation, although that is controversial for me to say that—for Universal Service purposes but also internationally as well for just international intergovernmental regulation of internet services.

So there is that potential, again, that when you start talking about Title II, as I was saying earlier, and that is the backdrop, it starts to bring up all of these questions and that is why I think you need to erase the white board and start clean.

Mr. BILIRAKIS. OK. Thank you very much.

I yield back, Mr. Chairman. Thank you.

Mr. DOYLE. I thank Mr. Bilirakis.

Let me just say for my colleagues, for the record, that when the—Mr. Bilirakis asked if a future FCC Commissioner could unforbear the—once again, Mr. McDowell correctly answered that under the 2015 Open Internet Order that answer is yes. But under this bill that answer is no because this bill puts in statute that forbearance and only an Act of Congress could do that.

Who is next? Oh, I see the Chairman of our full committee has returned and we yield 5 minutes to Mr. Pallone.

Mr. PALLONE. Thank you, Mr. Chair.

Net neutrality is really about the core values that Americans hold dear—free speech, competition, innovation.

I wanted to ask Mr. Wood, I know these ideas are important to Free Press. Can you discuss how the Save the Internet Act would promote free speech and economic opportunity for small businesses

and how that compares to the Republican neutrality proposals that we have seen recently?

Mr. WOOD. Sure, Chairman Pallone. Thank you very much for the question.

We have heard today that the FCC rules could be a sort of “Mother may I” for ISPs. I don’t think that is actually true, based on the conduct of the FCC.

The last thing we want and the reason we are so much in support of these rules is we can’t afford a “Mother may I” for American businesses.

So what these rules do is they provide that open pathway that people have always had to start a business, to get educational opportunities, to say what they want, to organize for change, without having to get the cable or telephone companies’ permission and that is a good thing. It keeps in place the rules we’ve had albeit on a shifting legal framework over the course of the last decade and a half.

Mr. PALLONE. Thank you.

Ms. Ochillo—I hope I am pronouncing it properly—it is incredibly important to this committee that we help every American be able to afford the incredible power that comes with broadband internet access and I know making sure more people can access a wide array of material on the internet is key for the National Hispanic Media Coalition.

So my question is can you explain how the Save the Internet Act would help low-income folks get access? And I have heard some say that without net neutrality poorer Americans will be relegated to second-class status online, only being able to afford junk internet plans. So what do you think about that? How would the bill help low-income and what about without neutrality what would happen? Would they just get junk plans?

Ms. OCHILLO. To the first part of your question—thank you, Congressman—I do want to tie it to something that I said when Congressman Soto asked me about what I would add to this, and since we are in the spirit of compromise and talking about things that we can do to make it better, I think that we should think about putting in protections for Lifeline and, specifically, Lifeline, as I have mentioned over and over again, is one of the only programs that people have to get access to telecommunications and there are no other Federal agency—there is no one who is dreaming up any other programs.

To why net neutrality is helpful to people who are currently denied access, I think we need to be honest about the fact that when there are—when there is no net neutrality in place, even though it will be hard to detect at first, ISPs are going to slowly start to rise—like, prices will eventually start to rise.

They are going to start putting in more tolls to access. If they say you have a Comcast plan, but you want to have Netflix, you want to have Hulu, it is going to cost you maybe instead of a \$10 add-on it might be \$12. And I think that it is important to note that when the net neutrality repeal was announced back in November of 2017, that day Comcast actually removed from its website its three-year pledge against paid prioritization. Not the paid

prioritization that is helpful for safety but paid prioritization that costs consumers more for the things that they access now.

So, I think that we would be fooling ourselves if we thought that if we just left it to internet companies to regulate themselves that we wouldn't eventually pay more because when the cable companies went and interrupted the broadcast in 1960s, they were supposed to be offering new competitive and diversity and all sorts of things.

And 20 years later, they started bundling packages and saying, I think the consumers in this section of the country want to watch X and I think that you should pay Y because this is what this provider is charging you.

So I think that it is just—we have to have an honest conversation that eventually that will trickle down to consumers.

Mr. PALLONE. I appreciate that, and I have one last question for Mr. Green.

At our last hearing, we heard some argue that we shouldn't have strong net neutrality protections because they would undermine investments in networks.

But I find that hard to believe, since we saw the Financial Times report recently that the big four broadband companies invested less in capital projects last year after the repeal of net neutrality protections, undermining the Trump FCC's reasoning for doing away with the rules.

So, Mr. Green in your experience, as an internet service provider, should we believe these arguments that strong net neutrality, like those that the Save the Internet Act would reinstate, would undermine network investment, and why or why not?

Mr. GREEN. Demand is driving the investment. That is just—the end of the day, it is the economy. If there is demand and there is a need, people like myself in business, entrepreneurs, will find the capital and the resources to create a return for their investment and compete in a fair marketplace.

Mr. PALLONE. So, you don't think that reinstating the rules under the Save the Internet Act would undermine network investment at all? You don't see that being linked?

Mr. GREEN. No, I do not.

Mr. PALLONE. All right. Thank you so much. Thank you, Mr. Chairman.

Mr. GREEN. You are very welcome.

Mr. DOYLE. I thank the gentleman.

The Chair now recognizes Mr. Long for 5 minutes.

Mr. LONG. Thank you, Mr. Chairman.

And Mr. McDowell, Title II is intended for common carriage networks such as the state-of-the-art telegraph and railroads. But what strikes me is that with each network revolution the old rules no longer make sense and new rules were needed.

That is exactly why we need 21st century rules for a 21st century service, not rules from the 1930s for rotary telephone service.

From your vantage point, what are the risks to regulating the internet in the same way as common carriers?

Mr. MCDOWELL. Thank you, Congressman. So excellent question.

So, you know, the history of common carriage goes back to the idea of natural monopolies like a canal. You dig a big long ditch,

fill it with water, and it is the shortest point between—distance between point A and point B.

The telephone system was considered to be a natural monopoly because of the telephone poles and the wire you had to string up, or railroads—again, the shortest point between point—shortest distance between point A and point B.

And then that common carrier regulation really started with the Interstate Commerce Act of 1889 in our country for railroads and then was applied to airlines and trucking, et cetera and we still have the 1934 Act, obviously, with the Ma Bell monopoly.

But things are different with the internet and it was actually during the Carter administration—Jimmy Carter's administration—where a lot of these common carriage statutes and regulations started to be regulated. So railroads, airlines, trucking—those were all deregulated under the Carter administration.

We saw investment go up. We saw transit time go down for the transportation sector. We saw consumer choice go up. A lot of what is advertised to be the benefits of common carrier regulation it is actually the opposite.

So what does that tell us? That tell us that transit times were slower under common carrier regulation. Prices were artificially higher under common carrier regulation. Consumer satisfaction was lower. They just didn't know it because that was the only choice at the time.

So those are some of the problems with common carrier regulation.

Mr. LONG. OK. Thank you.

And, Ms. Ochillo, while you were speaking to Chairman Pallone a minute ago, you said, when we are in the spirit of compromise. Some others have said compromise and they call it bipartisanship at a earlier hearing.

When we are in the spirit of compromise, do you think attacking people on Twitter is a good idea or a bad idea?

Ms. OCHILLO. Sir, respectfully, I don't attack people on Twitter any day of the week. So, I don't ever do something like that.

Mr. LONG. I appreciate that. Thank you. I am glad that you don't attack people on Twitter.

Mr. Wood, one question comes to mind is Free Press was—I don't know if that was pun intended or not when they named Free Press. But I have two items that I would like for Free Press to respond to on the record, and I know you won't have these figures with you here today. So if you can provide those in writing I would appreciate it.

The first is how many fundraising emails your organization sent regarding net neutrality and the open internet rules within the—in the last two years, and second, how much money Free Press raised through those emails?

I want to highlight the fact that Free Press, Flight for the Future, and other groups exist by dividing Congress on this issue. During the February 7th hearing, as soon as a representative from the majority said he or she would like to work on bipartisan legislation they were—from the minority, I think, they were immediately attacked by you on Twitter and you attacked me on Twitter right after that hearing.



Attacking people is the only thing Free Press does where they seem to think they need to operate in a bipartisan fashion—where they need Republicans, which is somebody to attack, and I think all Members of the committee should be wary when an organization says compromise and bipartisanship is the enemy, especially if their financial interests are involved.

And I hope you would follow Ms. Ochillo's lead and quit attacking people on Twitter when we are trying to do things in a bipartisan fashion and, as she says, in the spirit of compromise.

I yield back.

Mr. DOYLE. I guess that wasn't a question, pardon me?

OK. The gentleman yields back.

Mr. LONG. It was a question. I said I would like for him to respond in writing, so I yield back.

Mr. DOYLE. OK. Thank you.

The Chair now recognizes the vice chair of the full committee, Ms. Clarke, 5 minutes.

Ms. CLARKE. Thank you very much, Mr. Chairman. I thank you for holding this hearing. I thank our witnesses for their expertise today.

And I just want to say I don't know why Ms. Ochillo's name was even raised in that last piece that you had. We should restrain ourselves from trying to contrast and compare panelists. It is not a good thing. People can get confused from what was being said.

Mr. LONG. Will the gentlelady yield?

Ms. CLARKE. I will.

Mr. LONG. I didn't intend to cast any aspersion on Ms. Ochillo and I know she doesn't—

Ms. CLARKE. It came across that way, sir.

Mr. LONG. Well, I apologize because she does not—I knew she didn't attack people on Twitter.

Ms. CLARKE. Thank you. That is all I needed was the apology. OK. Very well.

Mr. LONG. I wanted her to say, I don't attack on Twitter—

Ms. CLARKE. Yes.

Mr. LONG [continuing]. Because I don't think that is a good—

Ms. CLARKE. I understand that. But we are in a hearing where we are trying to make sure that the record is accurate. And so I appreciate your apology, Mr. Long.

Mr. LONG. I yield back.

Ms. CLARKE. Let me get to my questions. So, Mr. Wood could you remind the committee of some of the historical net neutrality violations we have seen that the Save the Internet Act would actually address?

Mr. WOOD. Certainly. Thank you, Congresswoman Clarke.

There have been several. There were some that happened before the decision that Commission McDowell referred to earlier.

So, one of the most famous ones was Comcast was actually blocking video not from a competitor but, really, from any streaming video service being sent over a file-sharing application called BitTorrent. Before that we saw local phone companies in rural areas blocking Vonage and other VOIP applications.

More recently we saw AT&T not allow usage of FaceTime on mobile networks unless people were willing to pay more money for

that privilege and, in fact, you pay an unlimited—pay for an unlimited voice plan.

So, we have seen a lot of these kinds of transgressions even with the rules in place or principles in place throughout the last decade and a half.

Ms. CLARKE. Very well. And in your prepared testimony you described the ability of the Save the Internet Act to protect marginalized communities by repealing the 2017 FCC order and returning to the regulatory framework outlined in the 2015 Open Internet Order.

Can you expand on the role Title II Section 202 of the Communications Act plays in protecting marginalized and low-income communities?

Mr. WOOD. Certainly. Thank you again.

So what we want to have and make sure that we have is non-discrimination protections for anything someone says, not just for competitors. I think sometimes net neutrality is cast as some sort of battle between Comcast and Netflix or between AT&T and Google.

And, really, what we think it is is a guarantee for every internet user's right to see and say what they want online. So we have examples of this—actually, other services sometimes.

Verizon blocked text messages about abortion rights at one point in 2007, I believe. It could have been a year or two off of that.

And actually, NARAL and the Christian Coalition came together and said, this is the last thing we want. We can't have carriers dictating what we can say to our members.

So that was a Title II service at that point in time, or arguably one, in text messaging and sometimes ISPs will say why would we block things for political purposes. It is exactly the same kind of decision that we see them making at times.

If they think something will be unsavory to their users, they might decide to block it or treat it in a less favorable fashion and we can't afford that.

Ms. CLARKE. Very well.

Ms. Ochillo, in your opinion, does this seem reasonable for one of the approximately 24 million Americans without access to broadband to file an antitrust suit against a major ISP?

Ms. OCHILLO. Absolutely not, and I do want to point out that NHMC last year pointed out—I actually visited a lot of offices here on the Hill just to raise that the FCC at some point had an ombudsperson who was able to at least receive the open internet complaints and at least help people navigate that process. But, in general, consumers don't have any recourse and wouldn't know who to call.

Ms. CLARKE. Very well.

Mr. Green, can you—there was something in your testimony that you said earlier I need a little clarification on. Aren't enterprise broadband services, while not under the Open Internet Order, still under the nondominant carrier Title II just as broadband internet access service is?

Mr. Green?

Mr. GREEN. I thought you said Mr. Wood. I am sorry.

Ms. CLARKE. No, I am sorry. Mr. Green. Let me repeat.

Aren't enterprise broadband services, while not under the Open Internet Order, still under nondominant carrier Title II just as broadband internet access service is?

Mr. GREEN. They are.

Ms. CLARKE. Very well.

Mr. Chairman, thank you very much. I yield back the balance of my time.

Mr. DOYLE. I thank the gentlelady.

The Chair now recognizes Mrs. Brooks for 5 minutes.

Mrs. BROOKS. Thank you, Mr. Chairman and Ranking Member Latta, and thank you to all the witnesses for being here today.

I apologize I have not been able to be here. I have been a part of a hearing on Select Committee on the Modernization of Congress where technology has been a big part of that hearing. So we have been hearing from Members all morning and it just finished, so I apologize.

I do feel a little bit like in a bit of deja vu right now because, I feel like we had discussions about this about a month ago, and I just want as members of the committee to know that I believe all of us support a free and open internet that has proper transparency protections to ensure there is no blocking and throttling, and I know we are debating a bill that I wish was not partisan—that I do wish and I heard when the hearing began we need to end the ping ponging on this issue and, I think the country really is demanding that.

But I think right now, as I understand it, the bill that is before us has no chance of really being taken up by the Senate or being signed by the president. So, we need to move forward.

And one of the reasons we need to move forward I am a co-founder of a 5G caucus here in the House of Representatives and we have got to stop fighting about this in the country.

We have got to get our act together as a country, so we are not falling behind the rest of the world and falling behind many other countries that are going to beat us in this next round of technology called 5G.

So, I have been proud to work with colleagues on both sides of the aisle on some of these issues. I want to continue do to that.

I guess I would like to start out, Mr. McDowell, and would ask all of you actually what impact would, if you were to restore the FCC's 2015 Open Internet rules, have on the likelihood that U.S. will be able to lead the world in the deployment of 5G network and services, something I think we all need to be very focused on?

Mr. McDOWELL. First of all, congratulations on founding the 5G Caucus. I think that is very important.

Mrs. BROOKS. And for the record, I founded that with Congresswoman Debbie Dingell, also Congresswoman Annie Kuster and Congressman Tim Walberg.

So, we are going to be focused on this. We have to be focused on this as a country. It is a bipartisan caucus. I encourage my colleagues to join the caucus.

But let us talk about how what we are talking about could have an impact on our global competition to be a leader in the world on 5G, and I will start with you.

Mr. McDOWELL. And so the U.S.'s leadership in 5G is by no means a foregone conclusion. It is not inevitable, and you are right to call that into question. There is a lot that has to be done as we spend maybe \$300 billion or more over the next six or seven years as a country to build out 5G.

So when you are raising that kind of capital, you are going to get questions from lenders, from investors, of all stripes as to what are the potential economic effects of the economic regulation of Title II. And Title II, make no mistake, is a statute all about economic regulation. That is exactly what it is.

So that could cause a stutter step, as we have seen evidence in the record thus far with the smaller ISPs—for not just smaller ISPs in the 5G space but the larger ones as well. So that kind of uncertainty is not what we need to win the race to 5G.

Mrs. BROOKS. I guess I would ask some other panelists how would you assure me and assure those of us who are trying to promote 5G that this type of regulation would not impede 5G implementation.

Ms. Ochillo?

Ms. OCHILLO. I don't think that net neutrality regulations impede it. However, I do want to acknowledge that a lot of 5G is based on actually some paid prioritization networks.

5G, I think that people forget, is based on fiber wireline in the ground and, essentially, we have to create incentives for companies to want to go into places, especially hard-to-reach rural communities, poor communities where they are not getting the same return on those—that investment.

I think that we can create incentives from both the Federal and State Governments by saying if you want to get a permit to lay wire in this district then you also have to lay it these other two.

I think that there are other creative ways that we can think about this rather than saying that net neutrality is closing a door, because if we are giving access to people with net neutrality by saying here, here is something that everyone should have access to this universal platform and, concurrently, the United States is working on becoming a leader in the 5G network, that does not mean that they have to compete with one another.

They might complement one another. But that is going to take some creativity and a commitment from the Federal and State Governments.

Mrs. BROOKS. Thank you.

Mr. McDowell, I keep hearing the word balance more around this debate. Given that you think no legislation is needed to ensure the rights of consumers with broadband investment, what do you think the FCC should do to prevent throttling, blocking, or prioritization, looking forward?

Mr. McDOWELL. Those concepts are all about competition or what's anti-competitive, right. So, I think Section V of the Federal Trade Commission Act covers that, as do other antitrust statutes.

What is important to understand, too, about the FTC, a consumer doesn't have to file an antitrust complaint. The FTC is a consumer protection agency and thousands of times a year responds to average everyday consumers and acts on their behalf.

It has, you know, over \$300 million and 600 lawyers to do just that and that is what they do. You don't need to be spending any money as a consumer or worry about time. That is precisely what it does. That is where broadband internet access services are today is at the Federal Trade Commission.

Mrs. BROOKS. Thank you. I yield back. I am out of my time. Thank you. I yield back.

Mr. DOYLE. The Chair recognizes Ms. DeGette for 5 minutes.

Ms. DEGETTE. Thank you very much, Mr. Chairman.

I really agree with my colleague, Mrs. Brooks, about the need to get some certainty here and, I really think it is important. But I need—when we look at certainty, we need to make sure that we are putting the rights of the consumers and of access first that is what I really think.

But I was so happily reminded by my staff that I was on the Energy and Commerce Committee in 2005 when Chairman Martin issued his first version of the net neutrality rules.

Then I was still on the subcommittee in 2010 when Chairman Genachowski issued his version of net neutrality rules. And then now I was still on the committee in 2015 when Chairman Wheeler issued his version of the rules.

And so we have had no shortage of creative approaches to this issue and, of course, we've had court decisions and other things that intervened.

And I guess I want to ask—I want to start with you, Mr. Green. Would you say that this long-running process has created more or less certainty for your company, as you make your business plans?

Mr. GREEN. I find it to have created less certainty on the long run. I certainly feel your pain in sitting through those number of changes.

I would also add that around 5G, number one, we should thank the FCC for removing some barriers to open up things in the area of 5G so we should appreciate the FCC for the changes that they have made and acknowledge that.

The other thing I would say is that, you know, this open internet—the very reason we are here today, it is a driving investment for 5G.

I mean, open internet is a driver for 5G. So, I think it is very important to acknowledge it.

Ms. DEGETTE. So would you agree with Ms. Ochillo that 5G and open internet are not necessarily counter to each other?

Mr. GREEN. I would agree with that. I think open internet is another—first of all, the one thing you have with open internet is, you know, you have a common ground in terms of competition and then from there the competitive demands will drive—will drive one another.

Ms. DEGETTE. Thank you.

Mr. Wood, is there any reason you can see why Congress should start all over on a whole new bill?

Mr. WOOD. No, I don't believe so Congresswoman. I think that is the important part about compromise here and the legislative process.

Sometimes I say if we want the same rights, we will have the same fights about these bills, and I think that is in my testimony.

So, I don't think that the last 15 years have been legally certain. That is obvious. The rules have gone back and forth.

Now, the FCC won when it used Title II and it lost the previous two times. But each time those three lawsuits were brought by cable and telecom providers or their lobbying associations.

So if we are tired of ping pong, I would respectfully ask those companies to put down the paddle and just to keep investing as they have done throughout that time.

The trend lines have been basically the same and the investment goes up and down over time because, as AT&T said, investment is cyclical. They actually called it lumpy.

And, so companies invest and we are seeing the wireless companies ramp up their investments now for 5G.

Ms. DEGETTE. But, you know, even for those companies, like Mr. Green's company, the lack of certainty has to be a real impediment.

Mr. WOOD. I think it is a factor. But we haven't seen it in the numbers at the FCC, what the companies tell their investors in analyst calls. Despite what Mr. McDowell said, we don't see analysts or the companies themselves, more importantly, saying there is an impact and we also see steady—not necessarily sufficient but steady improvement in rural areas, too, if we look at the FCC's deployment data.

Ms. DEGETTE. Thank you.

One last thing, and I know some of my colleagues talked about this, but my congressional district includes Denver, Colorado, which is one of the top places not only for telecom but also for Millennials moving there.

And, whenever we talk about net neutrality this is the number-one issue that my constituents raise. When I tell my colleagues this they can hardly believe it sometimes but it is the number-one issue for the constituents and what they are—what they are saying is they think ISPs are a mean to an end, whether that is streaming music or movies or accessing my congressional website or whatever they are trying to do.

So my question—my last question for you, Mr. Wood, is what does public opinion polling tell us about what average Americans think about net neutrality.

Mr. WOOD. Thank you.

It is, remarkably, high the consistent level of support we saw last April. Eighty-six percent of people saying they supported keeping the FCC's 2015 rules and opposing that repeal. That included 82 percent of Republicans.

I think most people think of this as common sense, and then when we talk about the edge providers as well, they do see internet access as a means to get there.

I want to be clear. We don't have some sort of blank check for edge providers. We think that they are engaging in all sorts of abuses. But they are still different from the wire that gets you there and that is why people basically want and demand that these rules be restored and be put back the right way.

Ms. DEGETTE. Thank you. Thank you, Mr. Chairman.

Yield back.

Mr. DOYLE. I thank the gentlelady.

The Chair now recognizes Mr. Butterfield for 5 minutes.

Mr. BUTTERFIELD. Did we run out of the minority, Mr. Chairman?

Let me just begin by thanking the four panelists for coming today and thank you so much for your testimony.

Commissioner McDowell, I was listening very carefully to your opening statement and I just want to thank you for your thoughtful approach to the subject matter.

You called for a bipartisan approach. You called for certainty, and I am going to do something I rarely do. I am going to take your opening statement home with me tonight and I am going to read it again.

Mr. MCDOWELL. I am so sorry.

Mr. BUTTERFIELD. And so I thank all of you.

[Laughter.]

Mr. BUTTERFIELD. But, Commissioner McDowell, in 2015—and I, too, have been here under three chairs—Genachowski, Wheeler, and Chairman Pai.

But in 2015, the—I think you had just left a year or two before then—the FCC forbore over 700 regulations that the commission had the authority to enforce under Title II.

Will this bill as we know it make it more or less difficult for the FCC to utilize its forbearance authority on additional regulations in the future?

Mr. MCDOWELL. I will take it face value Chairman Doyle's assertion that the intent is to make it harder for the FCC to wiggle away from the parameters of the bill.

But I will say this, as an attorney. There will be lots of lawyers trying to argue both sides of that. They will argue every word of it. So the uncertainty doesn't necessarily go away.

Mr. BUTTERFIELD. Commissioner McDowell, ISPs have expressed concern that the additional regulations under Title II have a chilling effect on their ability to invest in the expansion of their networks, and I understand their anxiety. Even though I may not agree with it totally, I certainly understand their anxiety.

How will this bill affect the deployment of rural broadband by ISPs?

Mr. MCDOWELL. We have seen in the FCC's record as well as your hearing a few weeks ago and throughout the debate concern by the smallest of ISPs.

So perhaps we can all say that the big carriers can take care of themselves. Actually, most of them are engaging in M&A in areas outside of broadband in order—which can also distort, by the way, their CAPEX figures.

But the smaller ISPs I think are genuinely, sincerely, and verifiably very concerned about the questions they will get from lenders and that is in the record. It is under oath. It is in a lot of different places.

Mr. BUTTERFIELD. Mr. Wood, if I can address this to you, sir. Historically, the FCC's policy positions have changed with each administration. Will this bill provide ISPs and other stakeholders with the regulatory certainty to innovate and to invest?

Mr. WOOD. Yes, Congressman. Thank you for the question.

I believe it will. I would not quibble with the characterization, but I would alter it perhaps slightly to say that the FCC hasn't changed policies.

It has just changed the legal grounds on which it has founded those policies. And so when the FCC tried to adopt the internet principles—open internet principles in 2005 and grounded those on Title I, they failed in the court of law.

The same thing happened with the Genachowski administration or the Genachowski FCC. They, once again, were struck down in court. They came back with essentially the same principles.

There had been some changes in the wording and the rules over time. But we have had the same kind of principles that the FCC has tried to enact three times and they finally got it right on that third try and were upheld in court two times.

Mr. BUTTERFIELD. All right.

Ms. Ochillo, thank you for your testimony. In your testimony, you remarked that the way in which we decide to regulate the internet will have a direct impact on broadband adoption and access.

How will this bill create opportunities for communities of color and help to eliminate disparities that you and I know exist in broadband access?

Ms. OCHILLO. I think that it is important—thank you very much for the question, Congressman.

I think that it is important to put net neutrality protections in statute, and I think at this point we need to be very aware of the fact that the people who are left behind in the digital divide don't have an opportunity to come into this space and to, basically, fend for themselves.

And our organization is constantly just trying to explain if we are not aggressive about saying we need to actually make sure that no one can have discriminatory practices to make sure that access is a priority for Congressmen, for everybody, whether it is a provider, for everybody.

There is actually a cost when people can't get online, and I think that it is important for us to support this type of legislation because at least it gives people an opportunity to acknowledge that the internet is like a utility.

It is something that everyone needs, and the truth is that even the FCC has acknowledged that it is essential for every single part of daily life, and I think that this is something that supports that proposition.

Mr. BUTTERFIELD. Thank you.

Thank you, Mr. Chairman. I yield back 16 seconds.

Mr. DOYLE. I thank the gentleman and I would comment that while my good friend, Mr. McDowell, acknowledges that the bill would make it—would make it—prohibit forbearance—unforbearing what has been forboreed in the order that we all understand his comment that an attorney will argue anything as long as someone will pay him to do it.

So, I think that is something we are never going to change no matter what the bill looks like. But I thank the gentleman.

Mr. Schrader, you are recognized for 5 minutes.

Mr. SCHRADER. Thank you, Mr. Chairman.



I just want to thank you for bringing the bill to the hearing here. It is a good opportunity for us to have this debate. The testimony has been informative for me at least and I look forward to moving on and hopefully come to some bipartisan agreement, as everyone has talked about, at some point in time.

The best legislation stand the test of time through various administrations and different Commissioners. It would be best if we actually got together and tried to come up with a compromise that would work for everybody out there because we all do want a free and open internet, at the end of the day.

With that I yield back, Mr. Chairman.

Mr. DOYLE. I thank the gentleman.

I see that Mr. Welch has entered the room and he is recognized for 5 minutes.

Mr. WELCH. Thank you very much, Mr. Chairman.

And by the way, I really appreciate the work you are doing in leadership on this. We have got a—and I missed some of the testimony but watched some of it on TV.

Mr. McDowell, it is good to see you back.

You know, the bill that we have—I know you have discussed this—but it really seems practical to me. There is uniformity that we don't want blocking or throttling or some of the other things.

We also don't want the heavy hand of regulation, and what I thought was very wise about the proposal here was that we guaranteed there would not be all the Title II concerns and that was in response, frankly, to a lot of our colleagues and some of the folks in industry expressing apprehension about the uncertainty with the potential of heavy-handed Title II regulation.

I wasn't fearful of that. You know, Mr. Wheeler, when he was the head of the committee or when he was the Chair forbear but—trust but verify. So this to me, makes a lot of sense, and I hope that we ultimately can proceed.

But so thank you, Mr. Doyle, on that.

I want to go to Mr. Green. I think you have been asked this already but I would like to hear it again because a lot of the argument that we have had here is about this crucial question of how we deploy broadband and the apprehension that some folks have that unless there is certainty it will inhibit the deployment of broadband.

That is an incredible concern to Republicans and Democrats on this committee who represent rural areas because we have been left behind and it is intolerable.

So you were investing before under the old rules and you are investing now under the new rules, and I would like you to just elaborate on that because I think all of us, at the end of the day, want to be confident that there is going to be investment to deploy broadband.

Mr. GREEN. Thank you for your question, Congressman.

We have had excellent success and we have been very fortunate, and we have been blessed. I always like to mention that because that is my higher calling, from my perspective.

But we have \$30 million of fiber assets in the ground today. We started in 2010. I am just an old telecom guy from Spokane, Washington, and Coeur d'Alene, Idaho.

But the investments at the moment—to answer your question more specifically, we have \$10 million of backlog, meaning we have \$10 million of customers who have requested services from us to reach to internet and at the moment we are deploying that capital so that we can get those customers connected to the internet.

So, we are having great success. If you look at the fact that we have \$30 million in the ground and in the last year we created another \$10 million of demand, that is, obviously, telling you the demand is great and it becomes greater and greater every day.

It is a combination of 5G. It is a combination of, you know, the cloud, streaming, all of those sorts of things. And so we are having excellent success and have had excellent success during the tenure of our company and, certainly, from the Act of 2015.

Mr. WELCH. So this Act in your view, would not—this proposal by—authored by Mr. Doyle would not inhibit your plans, going forward?

Mr. GREEN. Not at all.

Mr. WELCH. All right.

You know, my goal here on the committee with respect to internet has been to do two things: expand broadband in rural areas and across the country and, second, guarantee that the internet remains free and open. I think we are all on the same page on that.

But in my rural State, we are not debating 5G. We are dealing with no G in many places, and it has got to be a decision that we make in this Congress as to whether we are going to treat internet much like we did electricity in the 1930s.

And there is not an economic case to be made to put it out in rural America but there is a social case to be made. We are all in it together or we are not.

Do you see having clarification about these rules that are codified in this proposed legislation as being helpful to accomplish that?

I will ask you, Mr. McDowell. I will let you weigh in on that.

Mr. MCDOWELL. So first of all, let me say something at the outset, which is—and I know we don't have much time but that open internet and Title II don't have to be synonymous or exclusively synonymous to each other.

From the time the internet was privatized in the mid-90s until the 2015 Title II order, we had an open and freedom-enhancing internet. I think that is very important.

It has just been raised here a few times that the only way you can have an open internet is by bringing in Title II. You might be able to bring up a principle of Title II. I think it is better to start with the 2005 principles from Chairman Powell.

But Title II is not synonymous with an open internet and brings in a whole host of collateral circumstances and unintended consequences.

So that is what provides a lot of investment uncertainty or just operational uncertainty, going forward, especially as ISPs, as was said earlier, are merely a means to an end.

Actually, ISPs are converging into many business lines and offering multiple services and benefits to consumers just the way edge providers are providing not just content and apps or algorithms but also delivery systems.

So as you see this convergence I think it is important for this committee to take that into account as you come up with a new piece of legislation.

Sorry, Mr. Chairman.

Mr. WELCH. I yield back.

Mr. DOYLE. The Chair now recognizes Mr. Cárdenas for 5 minutes.

Mr. CÁRDENAS. Thank you, Mr. Chairman. I appreciate the opportunity for us to talk on this bill and have a better understanding of what is going on out there and how we are going to effectuate change, especially when it comes to consumer protections.

One of the goals of this legislation is to codify the provision of the 2015 rules that forbears 700 regulations from applying to internet service providers.

During the last hearing here, former FCC Chairman Wheeler argued that some of the most onerous provisions of the Title II regulation don't make sense for the internet, which is why the FCC forbore these provisions in the 2015 order.

This component is important to balance consumer protection while also ensuring business can invest and build their networks on consumers, which have great products to choose from.

So Mr. Wood and Commissioner McDowell, if this bill is enacted into law, could any future FCC apply any of those regulations that have put in forbearance—that are putting in forbearance?

Mr. WOOD. You said my name first. I guess I will go first. Thank you, Congressman.

I don't believe so. As we have heard, that could be litigated and that is, obviously, true. I would point to the decades of lucrative litigation after the '96 Act to reinforce Chairman Doyle's notion that any new bill could be litigated. I think this one is actually very tightly written, though, and would prevent that kind of retreat by the FCC.

Mr. CÁRDENAS. So, you see that this bill would protect against that if it comes along?

Mr. WOOD. I think that is exactly what it says, that it would basically ratify the 2015 decisions and make those part of the statute or part of a congressional enactment rather than leaving it to the FCC to strictly determine forbearance.

I should say that over the years that is what they have done. They have forbore from wireless voice and from nondominant carrier regulation of broadband when it sold to businesses. So, we do have a track record of that. But this will would make Congress giving the stamp of approval to that.

Mr. CÁRDENAS. Thank you.

Commissioner McDowell?

Mr. MCDOWELL. Given sort of the long lens of history and the history of common carriage regulation, I would say not—that actually history—the trajectory of history is on the side of sort of a one-way ratchet of common carrier regulation—that once you have some you are going to get more.

So, I would respectfully say that this bill actually would open the door and not close the door to more regulation.

Mr. CÁRDENAS. Yes. OK. Do you have an opposite answer to Mr. Wood?

Mr. McDOWELL. No.

Mr. WOOD. That is right. We never disagree. You always used to talk about the bipartisanship at the FCC, right? It is 95 percent of the time we agree.

Mr. CÁRDENAS. OK.

Mr. Wood, can you talk about how Lifeline broadband was provided before the 2015 rules?

Mr. WOOD. Before the 2015 rules, sure.

The FCC has, for some time, been asking this question and before they reclassified basically the FCC was relying on Section 706 and other authorities it has to say, well, we can provide support at least for telecom companies because that is the way the Universal Service statute is written. You have to be an eligible telecommunications carrier.

So basically, the FCC allowed telephone companies to provide Lifeline but it didn't have great mechanisms for requiring that they do. We think the 2015 order actually got that right and treated broadband as a telecom service.

And now, not only has the Pai FCC walked away from Title II, they have also said Section 706 is not a source of authority. So now we are not really sure what they can do at least on a solid legal basis, speaking of litigation.

Mr. CÁRDENAS. Can you give an example on what—on what way the 2015 rule has impacted the Lifeline program?

Mr. WOOD. Well, I think we talked about this a bit earlier. I know Ms. Ochillo talked about it, too. There were nine providers who were offering a broadband only program, or at least plan to.

I believe one of them had launched service in Queens, New York, and they were cut off from the program because the FCC basically said, we have no way of funding you anymore if you are not an eligible telecommunications carrier, to use the words in the statute in Title II.

Mr. CÁRDENAS. So this legislation, if enacted into law, Mr. Wood, it would affect—in your opinion it would affect the opportunity for Lifeline programs in a good way, to flourish more, or would it limit them?

Mr. WOOD. I think it would clarify that broadband is a telecom service and fully eligible for eligible telecommunications carrier status and, thus, for support under the deployment aspects and also under the Lifeline program and Universal Service.

Mr. CÁRDENAS. OK.

Mr. McDOWELL. But just so there is no confusion, under the second Obama—the first Obama term, FCC, in 2011 and early 2012 we expanded Lifeline support and other Universal Service support to broadband, right. So that was before the 2015 Title II order at the FCC. So, I want to make sure folks are understanding that Lifeline is supported even if it is not a telecommunications service.

Mr. WOOD. And I would just ask under what authority that step was taken. If it was Section 706 or if it was Section 254 or some other sort of murkier cloud of authority.

Mr. McDOWELL. All of the above. That case went to the 10th Circuit under a variety of theories and survived appeal.

Mr. CÁRDENAS. Mr. Wood? What section do you—

Mr. WOOD. I think it survived appeal because they had 706 and how this FCC has said not only do, we not want to use Title II, we don't think Section 706 is a grant of substantive authority. So now I am not really sure what is left—what survived in the 10th Circuit—if we actually see another challenge to that.

Mr. CÁRDENAS. So with what time I have left, Mr. Chairman, I think it is important and I thank you, Mr. Chairman, for us taking on this responsibility because when we don't do our job as a legislature then we leave the appointed officials to do the job.

So thank you very much, Mr. Chairman. I yield back.

Mr. DOYLE. I thank the gentleman.

I don't want anyone to think that we are ignoring Mrs. McMorris Rodgers over here. But she is going to waive on to the committee and under our rules she would be entitled to speak after all Members of the committee have spoken.

So, Mr. Luján you have 5 minutes.

Mr. LUJÁN. Thank you very much, Mr. Chairman, and to our ranking member for holding this important hearing.

Mr. Wood, yes or no—does Mr. Doyle's legislation prevent internet service providers from blocking content?

Mr. WOOD. It does. It restores the rules.

Mr. LUJÁN. Yes or no—does this legislation prevent the throttling of content?

Mr. WOOD. Yes.

Mr. LUJÁN. Yes or no—does it prohibit paid prioritization?

Mr. WOOD. Yes.

Mr. LUJÁN. Yes or no—does the Republican proposal clearly prevent blocking, throttling, and paid prioritization?

Mr. WOOD. Some do that. They have some different approaches. Some say they would prohibit other behaviors and some actually do try to adopt the three bright line rules but in ways that we think are not sufficient to fully protect internet users.

Mr. LUJÁN. Yes or no—am I correct that Mr. Doyle's legislation prevents the FCC from applying 700 regulations under the Communications Act?

Mr. WOOD. Yes. I think that is the count.

Mr. LUJÁN. Beyond that, though, does Mr. Doyle's legislation include any other provisions that would unreasonably or needlessly handcuff the FCC including the authority to engage in rulemaking, going forward?

Mr. WOOD. No, I don't believe so and I think that is key—that rulemaking authority is preserved, and the FCC isn't handcuffed in doing its job to implement the statute.

Mr. LUJÁN. Yes or no—is that true of the proposals introduced by my Republican colleagues?

Mr. WOOD. Again, I think they differ in some respects from each other. But no, it is not true, as a rule.

Mr. LUJÁN. Let us put aside the legislation before us today. Do you think it would be reasonable for Democrats as part of free and open internet, meaning no blocking, no throttling, and no paid prioritization to trade codifying those provisions for a Federal Communications Commission without meaningful rulemaking authority, going forward?

Mr. WOOD. No, I don't believe that would be a wise trade.

Mr. LUJÁN. Why not?

Mr. WOOD. Well, we talked about a lot of the things the FCC does outside of net neutrality under Title II. So, the Lifeline discussion with Mr. Cárdenas and the rest of Universal Service was a good example of that.

But then there are also these questions that the FCC was trying to answer and needs to be able to answer about whether or not discriminatory conduct is in fact unreasonable even if it doesn't fit neatly within one of the bright line rules.

So, we don't see that as a problem. In fact, we see that as necessary—that the FCC had some residual authority as it is granted in Section 202 of the Communications Act to assess other kinds of unreasonable behavior even if they don't fit into the bright lines that this body may draw at some point in their future.

Mr. LUJÁN. Those were very similar points that I raised during the 2015 hearings on this particular subject. There was either markup or hearings on legislation of interest by Republican colleagues and this was an area that I focused on from a rulemaking perspective.

On another subject, can you also tell us why interconnection protections are so important?

Mr. WOOD. Sure. So what we have seen in the last half decade or so as occasionally or probably even more than occasionally but one especially well-documented period, millions of internet users were not getting the content that they had chosen to receive at the speeds that they deserved, and that wasn't because of congestion in the last mile, as it is sometimes called, but congestion outside of the network that comes to your home—the last mile of broadband network. And there were some disputes about what was causing that.

We think the evidence shows that companies like Comcast, AT&T, and Verizon were choking off the flow of information at that point and then they demanded payments in some cases, struck deals with not just Netflix but also other kinds of carriers, and that resolved the situation at least to our knowledge.

But we think there has to be some sort of oversight of that kind of behavior, and I think to your rulemaking point, too, this is exactly why we need it. You know, we have heard a lot about the FTC today and under context one of the things people note about the FTC is that it is not always able to do the best job it could do because it lacks rulemaking authority.

So while we talk about granting rulemaking authority to the FTC at times, I think we have to remember we shouldn't take it away from this agency to address these kinds of new problems and new impacts on internet users, and that is why this bill is actually the right way to go to keep that residual substantive authority as well as the agency's discretion to implement it.

Mr. LUJÁN. Commissioner McDowell, are interconnections important to small ISPs across America?

Mr. McDOWELL. Absolutely. Interconnection is an important part. Interoperability as well as standards. All related.

Mr. LUJÁN. What are your thoughts with the importance of inclusion of interconnection protections to ensure that smaller ISPs are able to survive?

Mr. MCDOWELL. So what happened since the internet was privatized in the mid-1990s until the Title II order of 2015 is that you didn't have Title II governing that, right. So, you had a thriving internet marketplace with ISPs, small WISPs, et cetera, even in New Mexico, without Title II.

So why was that? Well, you had—

Mr. LUJÁN. Well, being a former utility Commissioner myself I can tell you that many of those ISPs had to go before the local utility commission and the committee—the commission itself had to require some of those interconnection agreements be enforce because of the lack of rule of law.

Mr. MCDOWELL. Well, in that there were Title II common carrier transition components that they were either leasing or offering themselves. That is where the common carriage came in. That is where state jurisdiction came in—mostly the Title II transition component of all that.

But there is Section I and II of the Sherman Act, Section III of the Clayton Act, Section V of the Federal Trade Commission Act. All of that could help in that regard.

Mr. LUJÁN. OK.

Mr. Chairman, I will be submitting a question to the record for Ms. Ochillo based on her profound testimony as well, especially looking at comparison between New Mexico and New York and I very much appreciate where that testimony is going.

So thank you, Mr. Chairman.

Mr. DOYLE. I thank the gentleman.

The Chair now requests unanimous consent to allow Mrs. McMorris Rodgers to waive onto the committee. Without objection, so ordered.

And I now recognize her for 5 minutes to ask questions.

Mrs. MCMORRIS RODGERS. Thank you, Mr. Chairman. I appreciate you being willing to have me join you all today and I continue to seek a bipartisan solution to address this issue of net neutrality and I believe that there is bipartisan support for the bright lines for, you know, making clear no blocking, not throttling, nor paid prioritization.

I am very disappointed to see the majority moving forward without really seeking a bipartisan solution. It is clear that this bill will not go anywhere in the Senate and if it is as dire as the other side continues to suggest, then I would—I would implore this committee to come together in a bipartisan way.

I believe that there is really an opportunity for us to come together and stop politicizing this issue. What we continue to see is a lot of rhetoric around net neutrality that has really been driven to a fever pitch.

We see dire predictions as to the end of the internet. We saw threats against the chairman of the FCC and his family—death threats—as well as some of our own colleagues.

And if it were truly the crisis that it is made out to be, I believe that there should be more willingness to solve it instead of moving ahead with a partisan approach.

This bill is not going to pass the Senate. It is not going to be signed into law and it is not really intended to do that. It is appar-

ent the goal is not about protecting consumers, innovation, and internet. It is about scoring political points.

For those who say they want to save the internet, however, in the time since Title II was repealed, network speeds are up drastically. Investment in coverage in rural areas has increased.

As we work to continue to close the digital divide, we need to decrease barriers to deployment, not increase them. I agree we need to protect consumers. But we also need to do it in a way that does not leave underserved areas of our country behind.

I represent a rural area of eastern Washington where we continue to have broadband needs and we need more deployment. Republicans for years have been offering to work with the Democrats to find an agreement only to be blocked and denied again and again.

Earlier this year, Mr. Walden, Mr. Latta, and I introduced three separate reasonable solutions to protect consumers and ensure the internet remains free and open.

My bill is based upon a law that passed in Washington State with overwhelming bipartisan support, signed into law by Governor Jay Inslee. It gives the FCC clear authority to enforce the bright line rules of net neutrality—no blocking, no throttling, no paid prioritization.

It is a solution that does not institute changes to the internet that would stop innovation, stifle broadband deployment and leave millions of Americans behind.

If my friends on the other side would like changes to my bill or others, we need to have that conversation. Let us work together. It is time to end the regulatory and legal confusion and bring certainty to consumers and the marketplace.

We want to guarantee that the United States remains a leader of technological innovation that we have been the last 20 years. We want every American to have access to the internet and the economic and social and educational benefits that connection brings.

We want to ensure that the next generation of networks originate here, ushering in a new era of technology that we can't even now imagine, and we should want to do it in a bipartisan way.

As Senator Cantwell tweeted when the Washington State bill became law, quote, "In our State, Republicans and Democrats came together. Why can't we see this same bipartisanship in the U.S. House?"

And I would like unanimous consent to enter into the record various tweets of support from Republicans and Democrats for the Washington State law.

Mr. DOYLE. Without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mrs. MCMORRIS RODGERS. Mr. McDowell, can you speak to the bipartisan consensus you saw around the issue, both at the commission and here in Congress prior to Wheeler's FCC move to reclassify broadband under Title II in 2015?

Mr. McDOWELL. Sure. In 2005, which was about a year before I got to the FCC under Chairman Powell, there was unanimous bipartisan adoption of the internet freedom principles—the consumer kind of bill of rights for the internet, if you will, and I think that is what could be the starting point.



Subsequent to that, though, you had bipartisan and unanimous votes after the Brand X decision, which was in June of 2005—the Supreme Court decision—making sure that it was clear that cable modem and broadband over power line and DSL and wireless broadband—all of those were properly classified under Title I and those were unanimous and bipartisan through the year of 2007.

But I think what we have seen today and in other discussions is—you know, no anti-competitive conduct that involves throttling and blocking and prioritization that is anti-competitive, et cetera, I think those are great starting points forward. You could have an overwhelming bipartisan majority of both Houses.

Mrs. McMORRIS RODGERS. Great. OK. Thank you.

I will yield back and just urge again that we come together and do this in a bipartisan way.

Mr. DOYLE. I thank the gentlelady.

Let me just say a few things. If the minority desires a bipartisan approach and wants to work with the majority, they should let us know about that. I got no phone call from the Chair or the ranking member of the subcommittee that they were interested in sitting down to discuss this.

What we got instead was three bills that were dropped without our knowledge, without us being informed in advance that you were going to do that, and then we got a letter that we didn't know was coming also on it.

I would suggest a better approach would be to sit down and talk with us before you drop bills. I know that after being in the majority for so long it might be difficult for some of my friends to recognize that they are not anymore and that the proper approach would be to talk to us before you drop bills.

Let me say a couple other things, too. This has been tried a long time. We talk about the ping pong that has gone on, and it has. But, you know, when this was tried by the FCC under Title I back initially in 2005, eventually Comcast—it was done as not a rule but as a set of principles.

But when it was put in real form Comcast sued and the commission lost. In 2010, once again, when the commission tried to do net neutrality rules under Title I, Verizon sued and the commission lost.

Under 215, Chairman Wheeler again put net neutrality rules that were anchored under Title II and it survived two challenges in court. That is where we are today.

What are Democrats doing with this bill? We are stepping towards our colleagues—our colleagues and people in the industry express concern that Title II with all its regulations, some which have no applicability to today's internet and the over 27 sections and 700 regulations, even though Commissioner Wheeler had forbore on them that a future FCC Commissioner could unforbear, and that caused them great concern.

So what we have done to address those concerns and step towards our colleagues is to codify the 2015 Open Internet Order, which also codifies the forbearance, which means those 700 regulations in 27 sections are no longer applicable, and while my good friend, Mr. McDowell, says attorneys can file lawsuits, well, that is

what attorneys do and no matter what bill was put forward that could happen.

So this was a good faith effort to move in their direction. I would remind my colleagues that in the Senate for the CRA 52 Members voted for the CRA in the Senate and that was before we have codified forbearance, basically eliminating 700 regulations and sections under Title II.

So, we are trying to work in a new way to put out a bill that recognizes some of the concerns we have heard from the minority and from some of those people in the industry and we are going to continue to move forward in regular order.

We have had our hearing today. We intend to put this through a subcommittee markup and then a full committee markup. The minority will certainly have opportunities at that time to express their opinions and their amendments and we look forward to that.

To the extent that they want to talk to us in advance about things we may be able to work on together, I would recommend that would be a good course of action.

So with that, I am going to ask unanimous consent to enter the following documents into the record: Number one, an opening statement from Representative Eshoo, an editorial from the Houston Chronicle, an op-ed from The Hill, an LA Times editorial, a letter from ALLvanza, a blog from ALLvanza, statement from CTIA, a statement from the NCTA, USTelecom blog, tweet from Rick Boucher, Bloomberg article, Politico Pro article, Washington Post editorial, The Hill editorial, East Oregonian op-ed by Joseph Franell, Multichannel article, letter from TechFreedom to Chairman Doyle and Ranking Member Latta.

Is that everything? Without objection, so ordered.

[The information appears at the conclusion of the hearing.]

Mr. DOYLE. I want to now thank the witnesses for their participation in today's hearing. We appreciate your testimony and we appreciate how patiently you have sat there and answered every question that was thrown at you, and it has been very helpful to this committee.

I want to remind Members that pursuant to our committee rules they have 10 business days to submit additional questions for the record to be answered by the witnesses who have appeared, and I would ask each witness to respond promptly to any such questions that you may receive.

[The article appears at the conclusion of the hearing.]

At this time, the subcommittee is adjourned.

[Whereupon, at 1:49 p.m., the committee was adjourned.]



Office of Commissioner Robert M. McDowell  
Federal Communications Commission  
Washington, D.C. 20554

May 5, 2010

The Honorable Henry A. Waxman  
Chairman  
Committee on Energy and Commerce  
United States House of Representatives  
Washington, DC 20515

Dear Chairman Waxman:

Thank you for the opportunity to testify before you and your colleagues on the Subcommittee on Communications, Technology and the Internet on March 25 regarding the National Broadband Plan.<sup>1</sup> As I testified at the hearing, the Commission has never classified broadband Internet access services as “telecommunications services” under Title II of the Communications Act. In support of that assertion, I respectfully submit to you the instant summary of the history of the regulatory classification of broadband Internet access services.

In the wake of the privatization of the Internet in 1994, Congress overwhelmingly passed the landmark Telecommunications Act of 1996 (1996 Act) and President Clinton signed it into law. Prior to this time, the Commission had never regulated “information services” or “Internet access services” as common carriage under Title II. Instead, such services were classified as “enhanced services” under Title I. To the extent that regulated common carriers offered their own enhanced services, using their own transmission facilities, the FCC required the underlying, local transmission component to be offered on a common carrier basis.<sup>2</sup> No provider of retail information services was ever required to tariff such service. With the 1996 Act, Congress had the opportunity to reverse the Commission and regulate information services, including Internet access services, as traditional common carriers, but chose not to do so. Instead, Congress codified the Commission’s existing classification of “enhanced services” as “information services” under Title I.

<sup>1</sup> *Oversight of the Federal Communications Commission: The National Broadband Plan: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the House Comm. on Energy and Commerce*, 111<sup>th</sup> Cong., 2d Sess. (March 25, 2010).

<sup>2</sup> Some who are advocating that broadband Internet access service should be regulated under Title II cite to the Commission’s 1998 *GTE ADSL Order* to support their assertion. See *GTE Telephone Operating Cos.*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd. 22,466 (1998) (*GTE ADSL Order*). The *GTE ADSL Order*, however, is not on point, because in that order the Commission determined that GTE-ADSL service was an interstate service for the purpose of resolving a tariff question.

Two years after the 1996 Act was signed into law, Congress directed the Commission to report on its interpretation of various parts of the statute, including the definition of “information service.”<sup>3</sup> In response, on April 10, 1998, under the Clinton-era leadership of Chairman William Kennard, the Commission issued a *Report to Congress* finding that “Internet access services are appropriately classed as information, rather than telecommunications, services.”<sup>4</sup> The Commission reasoned as follows:

The provision of Internet access service . . . offers end users *information-service capabilities inextricably intertwined with data transport*. As such, *we conclude that it is appropriately classed as an “information service.”*<sup>5</sup>

In reaching this conclusion, the Commission reasoned that treating Internet access services as telecommunications services would lead to “negative policy consequences.”<sup>6</sup>

To be clear, the FCC consistently held that any provider of information services could do so pursuant to Title I.<sup>7</sup> No distinction was made in the way that retail providers of Internet access service offered that information service to the public. The only distinction of note was under the Commission’s *Computer Inquiry* rules, which required common carriers that were also providing information services to offer the transmission component of the information service as a separate, tariffed telecommunications service. But again, this requirement had no effect on the classification of retail Internet access service as an information service.

In the meantime, during the waning days of the Clinton Administration in 2000, the Commission initiated a Notice of Inquiry (NOI) to examine formalizing the regulatory classification of cable modem services as information services.<sup>8</sup> As a result of the *Cable Modem NOI*, on March 14, 2002, the Commission issued a declaratory ruling

<sup>3</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2521-2522, § 623.

<sup>4</sup> *Federal-State Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd. 11501, ¶ 73 (1998) (*Report to Congress*).

<sup>5</sup> *Id.* at ¶ 80 (emphasis added).

<sup>6</sup> *Id.* at ¶ 82 (“Our findings in this regard are reinforced by the negative policy consequences of a conclusion that Internet access services should be classed as ‘telecommunications.’”).

<sup>7</sup> As Seth P. Waxman, former Solicitor General under President Clinton, wrote in an April 28, 2010 letter to the Commission, “[t]he Commission has *never* classified any form of broadband Internet access as a Title II ‘telecommunications service’ in whole or in part, and it has classified all forms of that retail service as integrated ‘information services’ subject only to a light-touch regulatory approach under Title I. These statutory determinations are one reason why the Clinton Administration rejected proposals to impose ‘open access’ obligations on cable companies when they began providing broadband Internet access in the late 1990s, even though they then held a commanding share of the market. The Internet has thrived under this approach.” (Emphasis in the original.)

<sup>8</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry, 15 FCC Rcd 19287 (2000) (*Cable Modem NOI*).

classifying cable modem service as an information service.<sup>9</sup> In the Commission's *Cable Modem Declaratory Ruling*, it pointed out that "[t]o date . . . the Commission has declined to determine a regulatory classification for, or to regulate, cable modem service on an industry-wide basis."<sup>10</sup> Only one month earlier, on February 14, 2002, in its Notice of Proposed Rulemaking<sup>11</sup> regarding the classification of broadband Internet access services provided over wireline facilities, the Commission underscored its view that information services integrated with telecommunications services cannot simultaneously be deemed to contain a telecommunications service, even though the combined offering has telecommunications components.

On June 27, 2005, the Supreme Court upheld the Commission's determination that cable modem services should be classified as information services.<sup>12</sup> The Court, in upholding the Commission's *Cable Modem Order*, explained the Commission's historical regulatory treatment of "enhanced" or "information" services:

By contrast to basic service, the Commission decided not to subject providers of enhanced service, *even enhanced service offered via transmission wires*, to Title II common-carrier regulation. The Commission explained that it was unwise to subject enhanced service to common-carrier regulation given the "fast-moving, competitive market" in which they were offered.<sup>13</sup>

Subsequent to the Supreme Court upholding the Commission's classification of cable modem service as an information service in its *Brand X* decision, the Commission *without dissent* issued a series of orders classifying all broadband services as information services: wireline (2005)<sup>14</sup>, powerline (2006)<sup>15</sup> and wireless (2007).<sup>16</sup> Consistent with

<sup>9</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling*), *aff'd*, *Nat'l. Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*).

<sup>10</sup> *Id.* at ¶ 2.

<sup>11</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (*Wireline Broadband NPRM*).

<sup>12</sup> *Brand X*, 545 U.S. 967.

<sup>13</sup> *Id.* at 977 (emphasis added, internal citations to the Commission's *Computer Inquiry II* decision omitted).

<sup>14</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era*, CC Docket Nos. 02-33, 95-20, 98-10, 01-337, WC Docket Nos. 04-242,

the Court's characterization, the Commission made these classifications to catch up to market developments, to treat similar services alike and to provide certainty to those entities provisioning broadband services, or contemplating doing so. Prior to these rulings, however, such services were never classified as telecommunications services under Title II.

Again, I thank you for providing the opportunity to testify before your Committee and to provide this analysis regarding the regulatory classification of broadband Internet access services. I look forward to working with you and your colleagues as we continue to find ways to encourage broadband deployment and adoption throughout our nation.

Sincerely,



Robert M. McDowell

cc: The Honorable Joe Barton  
The Honorable Rick Boucher  
The Honorable Cliff Stearns

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05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*), *aff'd*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

<sup>15</sup> *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006).

<sup>16</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

**DISSENTING STATEMENT OF  
COMMISSIONER ROBERT M. McDOWELL**

RE: *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* File No. EB-08-IH-1518, WC Docket No. 07-52

First, I'd like to thank the public interest groups who brought this matter to our attention for doing so. I'd also like to thank the Chairman for having us all focus on this case. Shining a spotlight on these issues has helped raise awareness and spark a debate which has been constructive, at times.

All of us can agree on a few things. The Internet should remain open and free. Our policies, and the policies of all governments everywhere, should promote such freedom. We can also agree that network operators could do a better job of educating consumers regarding the limitations of their networks and how those networks need to be managed to keep the Internet functioning. We have seen a lot of improvement in that area in the past couple of months due, in part, to this proceeding.

I also hope we can agree that applications providers could do a better job of designing software that works more efficiently on networks that were designed and built sometimes decades ago. The providers of certain peer-to-peer (P2P) applications, for example, could do a better job of making consumers aware that their applications require consumers' computers to work 24 by 7 in ways that can tie up their computing power and reduce broadband speeds for themselves and their neighbors.

I think we can also agree — and in this I concur in Commissioner Tate's statement — that it is tremendously important for network operators to be authorized to guard against unlawful Internet content such as child pornography, for the Commission to act as a mediator rather than a regulator when appropriate, and for network operators to adequately disclose their terms of service.

In that spirit, I am concerned that we are witnessing a deepening division between some in the application industry and some network operators. Both sectors are indispensable to our burgeoning Internet economy. History teaches us that we are all better off if we reject the rhetoric of the extremes on both sides and resolve technological disputes through collaboration and negotiation. Looking back through the long lens of time, it is obvious that the Internet is the greatest free-market success story of all time precisely because conflicts were resolved in this manner. Continued escalation of rhetoric serves no one well, least of all American consumers.

With those introductory remarks, it is time to move on to decide the matter at hand. Independent administrative agencies are interesting creatures. We are not part of the executive, legislative or judicial branches of government, yet we have quasi-executive, -legislative and -judicial powers. It is primarily our quasi-judicial powers we are exercising today. Accordingly, we are compelled by statute to examine the procedural issues before us as well as to weigh the facts against the current state of the law. Commissioner Tate and I received the current version of the order at 7 p.m. last night, with about half of its content added or modified. As a result, even after my office reviewed this new draft into the wee hours of the morning, I can only render a partial analysis.

As a procedural matter, what we have before us today is an order regarding a pleading that was filed as a "formal complaint." Our rules mandate that formal complaints apply only to common carriers.<sup>1</sup>

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<sup>1</sup> See 47 USC § 208 ("...complaining of anything done or omitted to be done by any common carrier subject to this Act . . ."); 47 C.F.R. § 1.711.

As the Supreme Court held in the *Brand X* case,<sup>2</sup> and as the Commission has held on numerous occasions since, cable modem service is not common carriage but, rather, an information service under Title I of the Act.<sup>3</sup>

If the complaint survives this first step, we should next look to see if we have jurisdiction to enforce our rules. I agree that we do have jurisdiction, in general, over these areas.<sup>4</sup> However, we do not have any rules governing Internet network management to enforce. Since the Supreme Court's decision in *Brand X*, we have been busy taking broadband services out of the common carriage realm of Title II and classifying them as largely *unregulated* Title I information services.<sup>5</sup> It does not take a law degree to understand that once we did that, the rules of Title II would no longer apply to broadband services.

Furthermore, the Commission did not intend for the Internet Policy Statement to serve as enforceable rules but, rather, as a statement of general policy guidelines.<sup>6</sup> Based on their remarks at the time, at least two of my colleagues in the majority agreed.<sup>7</sup> Indeed, in the *Wireline Broadband Order*, released the same day, the Commission clearly contemplated initiating a rulemaking in response to

<sup>2</sup> *National Cable & Telecoms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) (*Brand X*).

<sup>3</sup> *Id.*, 545 U.S. at 968. I also note that the format and content of the complaint were deficient in a number of ways, including a failure to cite to any sections "of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated." See 47 C.F.R. § 1.721(a)(4). Additionally, our rules require dismissal in instances such as this one where a "document purporting to be a formal complaint . . . does not state a cause of action under the Communications Act." 47 C.F.R. § 1.728(a). The complaint does not state a cause of action under the Communications Act because the Commission does not, in this case, have the authority to act in the absence of relevant rules.

<sup>4</sup> See *Brand X*, 545 U.S. at 976, 996.

<sup>5</sup> See, e.g., *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*; *Universal Service Obligations of Broadband Providers*; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*; *1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements*; *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with regard to Broadband Services Provided via Fiber to the Premises*; *Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises*; *Consumer Protection in the Broadband Era*, WC Docket Nos. 04-242, 05-271, CC Docket Nos. 95-20, 98-10, 01-337, 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Order*), petitions for review denied, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

<sup>6</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*; *1998 Biennial Regulatory Review — Review of Computer III and ONA Safeguards and Requirements*; *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*; *Internet Over Cable Declaratory Ruling*; *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CC Docket Nos. 02-33, 01-337, 98-10, 95-20, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

<sup>7</sup> See Chairman Kevin J. Martin, Comments On Commission Policy Statement, News Release (rel. Aug. 5, 2005) ("While policy statements do not establish rules nor are they enforceable documents, today's statement does reflect core beliefs that each member of this Commission holds regarding how broadband Internet access should function."); *Wireline Broadband Order*, 20 FCC Rcd at 14980, Statement of Michael J. Copps, Concurring ("While I would have preferred a rule that we could use to bring enforcement action, this is a critical step. And with violations of our policy, I will take the next step and push for Commission action.").



allegations of misconduct, emphasizing its “authority to promulgate regulations”<sup>8</sup> – regulations not written at that time, or today. Such intentions were, I thought, reinforced in 2007 when I voted to adopt the *Broadband Industry Practices Notice*, the first step in a *rulemaking* proceeding designed to determine whether rules governing network management practices were necessary.<sup>9</sup> As I stated at that time, we were taking “a sensible, thoughtful and reasonable step that should give the Commission a factual record upon which to make a reasoned determination whether additional action is justified or not, pursuant to the Commission’s ancillary jurisdiction to regulate interstate and foreign communications.”<sup>10</sup> The additional action I contemplated was the logical move from an NOI to an NPRM — not an unprecedented, and likely unsustainable, jump to rulemaking by adjudication. Like it or not, no notice of proposed rulemaking, with a chance for public comment, was ever issued. Nothing regulating Internet network governance has been codified in the Code of Federal Regulations. In short, we have no rules to enforce. This matter would have had a better chance on appeal if we had put the horse before the cart and conducted a rulemaking, issued rules and *then* enforced them.

The majority’s view of its ability to adjudicate this matter solely pursuant to ancillary authority is legally deficient as well. Under the analysis set forth in the order, the Commission apparently can do *anything* so long as it frames its actions in terms of promoting the Internet or broadband deployment. The fact that the D.C. Circuit has affirmed the Commission’s exercise of ancillary authority in very different adjudicatory proceedings and in the absence of regulations is, in my view, unpersuasive.<sup>11</sup> The Commission in those cases was acting pursuant to a provision of the statute that provides the Commission express grant of authority<sup>12</sup> or a statutory provision that imposed an “explicit” obligation on a class of entities that legislative history indicated was intended to be covered by the statute.<sup>13</sup> In this case, none of the sections of the Act identified in the order impose explicit and relevant obligations on Comcast, or any other broadband network operator. The Commission likewise overreaches in attempting to justify this order by extension of sections 1, 201, 256, 257 or 604. The majority presents no convincing argument that its regulation of a broadband network operator’s management practices is “reasonably ancillary to the effective performance of the Commission’s various responsibilities” under those sections of the Act.<sup>14</sup> Thus, in the absence of rules, neither the general policy goals set forth in sections 230 and 706 of the Act nor the attempt to extend our authority in sections 1, 201, 256, 257 or 604 provide enough of a legal basis for us to act. If Congress had wanted us to regulate Internet network management, it would have said so explicitly in the statute, thus obviating any perceived need to introduce legislation as has occurred during this Congress. In other words, if the FCC already possessed the authority to do this, why have bills been introduced giving us the authority we ostensibly already had?

<sup>8</sup> See *Wireline Broadband Order*, 20 FCC Rcd at 14904 n. 287 (“Federal courts have long recognized the Commission’s authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to the effective performance of the Commission’s various responsibilities”).

<sup>9</sup> *Broadband Industry Practices*, WC Docket No. 07-52, Notice of Inquiry, 22 FCC Rcd 7894 (Apr. 16, 2007) (*Broadband Industry Practices Notice*).

<sup>10</sup> See *id.*, 22 FCC Rcd at 7909, Statement of Robert M. McDowell.

<sup>11</sup> See Order n. 163.

<sup>12</sup> See, e.g., *New York State Comm’n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) (*New York State Comm’n on Cable Television*). *New York State Comm’n on Cable Television* noted that the Commission based its authority on the federal interest in “the unfettered development of interstate transmission of satellite signals,” which in turn was found to flow from Title III of the Act. See *id.* at 808 (citing *Earth Satellite Communications, Inc.*, Declaratory Ruling, 95 FCC 2d 1223 at paras. 15-16 (1983)).

<sup>13</sup> *CBS, Inc. v. FCC*, 629 F.2d 1, 26 (1980).

<sup>14</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

For the same reasons, the majority's arguments that the *Adelphia/Time Warner/Comcast Order* somehow constituted notice of the Commission's intent to adjudicate the Policy Statement,<sup>15</sup> and that Comcast's consummation of the merger approved in the *Adelphia/Time Warner/Comcast Order* constituted a waiver of its right to challenge such an adjudication,<sup>16</sup> fail. The Commission can not possibly be seen to have given notice to Comcast (or any other party) of a preference to adjudicate the Policy Statement because the Commission lacks the authority to adjudicate the matter in the absence of rules.

Further, although it relies heavily on the Supreme Court's description of an agency's adjudicatory authority in *Chenery II*, the majority ignores that same court's admonition to avoid adjudications that may have a "retroactive effect."<sup>17</sup>

Additionally, today's order relies on the *Madison River* consent decree of 2005 to justify today's actions.<sup>18</sup> The *Madison River* case differs in significant ways from what we have before us. For starters, none of the parties involved settled their differences "out of court" as Comcast and BitTorrent have done here. No arguments regarding network congestion and management were at play, as they are here. And most importantly, the Commission clearly relied on its Title II jurisdiction over Madison River, a rural local exchange carrier, rather than whatever ancillary jurisdiction it might have had under Title I.<sup>19</sup>

Perhaps most puzzling of all is the Commission's use of a "strict scrutiny" type standard to strike down the actions of a private party engaged in management of its network. The majority is too clever to call its standard of review "strict scrutiny," and with good reason. It is unprecedented, and inappropriate, for the Commission to judge the actions of a private actor by a standard that has generally been reserved

<sup>15</sup> Order at para. 35 (citing *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees, Comcast Corporation, Transferor, to Time Warner Inc., Transferee, Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8298, para. 220 (2006) (*Adelphia/Time Warner/Comcast Order*)).

<sup>16</sup> See Order at para. 27.

<sup>17</sup> Further, "such retroactivity must be balanced against the mischief of producing a result which is contrary to statutory design or to legal and equitable principles." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (*Chenery II*). See also *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 n. 12 (1984) (recognizing that "an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests"). The D.C. Circuit, the court to which this order most likely will be appealed, has identified five non-exclusive factors useful for determining when the retroactive effect of an adjudicatory decision is invalid. See *Retail, Wholesale and Department Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) ("(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.") The majority's application of the criteria described by the 9<sup>th</sup> Circuit in *Pfaff* is thus arguably inappropriate and, I believe, incorrect. See Order at paras. 33-36 (citing *Pfaff v. U.S. Dep't of House. & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996)).

<sup>18</sup> *Madison River Communications, LLC and Affiliated Companies*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (2005) (*Madison River*).

<sup>19</sup> *Id.*, 20 FCC Rcd at 4296, para. 1 ("The Investigation was undertaken pursuant to sections 4(i), 4(j), 218, and 403 of the Communications Act."). It is also worth noting that the consent decree did "not constitute either an adjudication on the merits or a factual or legal finding regarding any compliance or noncompliance with the requirements of the Act and the Commission's orders and rules." *Id.*, 20 FCC Rcd. at 4298, para. 10.

for determining whether the *government* has trampled on the fundamental constitutional rights of *individuals*. The Commission certainly has never used it to restrain private parties in their interactions with other private parties. Using a strict scrutiny standard in this context, especially one wearing a transparent disguise, is sure to doom this order on appeal.

Even if the complaint was not procedurally deficient and we had rules to enforce, the next step would be to look at the strength of the evidence. The truth is, the FCC does not know what Comcast did or did not do. The evidence in the record is thin and conflicting. All we have to rely on are the apparently unsigned declarations of three individuals representing the complainant's view, some press reports, and the conflicting declaration of a Comcast employee.<sup>20</sup> The rest of the record consists purely of differing opinions and conjecture. As the majority embarks on a regulatory journey into the realm of the unknowable, the evidentiary basis of its starting point is tremendously weak, to the point of being almost non-existent. In a proceeding of this magnitude, I do not understand why, in the absence of strong evidence, the Commission did not conduct its own factual investigation under its enforcement powers. The Commission regularly takes such steps in other contexts that, while important, do not have the sweeping effect of today's decision.<sup>21</sup>

Additionally, the majority does not address the issue of motive. The allegations before us boil down to a suspicion that Comcast was motivated not by a need to manage its network, but by a desire to discriminate against BitTorrent and similar technologies for anticompetitive reasons. If Comcast intended to harm its competitors, would it not have targeted other online video providers? Americans download more than eleven billion Internet videos per month, yet the record contains no evidence that Comcast is interfering with sites like YouTube which do not use pipe-clogging P2P software. The record also does not speak to the fact that other prominent video sites, such as Joost, use more efficient P2P software that does not cause the same congestion problems as BitTorrent. As a result of their use of software that works better on existing networks, virtually no network management is needed. The majority's silence on this key exculpatory point is deafening.

Finally, even if this case were not procedurally and legally deficient in so many regards, we must address whether the policies the majority is adopting today are in the public interest. And the answer is no. Ironically, today's action by the FCC may actually result in *slower* online speeds for 95 percent of America's Internet consumers. That is because, up until this point, engineers made engineering decisions, not unelected bureaucrats. Although I have a tremendous amount of respect for each of my colleagues, none of us has an engineering degree.

As a result, the practical effect of today's order requires *all* network operators – cable, telcos and wireless providers – to treat all Internet traffic equally. That sounds good if you say it fast. But the reality is that the Internet can function only if engineers are allowed to *discriminate* among different types of traffic. Now, the word “discriminate” carries with it extremely negative connotations, but to network engineers it means “network management.” Discriminatory conduct, in the network management context, does not necessarily mean anticompetitive conduct. And this is where a lot of the misunderstandings

<sup>20</sup> The only signed declaration in either File No. EB-08-IH-1518 or WC Docket 07-52 is that of a Comcast employee. See Declaration of Mitch Bowling, Senior Vice President & General Manager of Online Services and Operations, Comcast Cable Communications, LLC, filed with Letter from Kathryn A. Zachem, Vice President, Regulatory Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (July 21, 2008).

<sup>21</sup> See e.g., *Zaria*, Order to Show Cause, Notice of Opportunity for Hearing and Hearing Designation Order, EB Docket No. 03-152, 18 FCC Rcd 14938 (2003) (Commission field offices conducted investigations to determine veracity of allegations made in informal objections to broadcast license renewal applications); *New Jersey Broadband, LP and New Jersey Broadband, LLC*, File Number EB-05-PA-12621, Consent Decree, 21 FCC Rcd 12466, 12468 (Enf. Bur. 2006) (Enforcement Bureau investigation of potential violations of the Act and Commission rules included “inspections” and “direction finding measurements”).

come into play. As human beings, we do not tolerate delay or interference when it comes to certain kinds of applications. For instance, we expect our online movies to be clear and not distorted by competing data coming over the same Internet connection. For us to enjoy online video without interruption or distortion, video bits have to be given priority over, say, email bits. But now that all traffic must be treated equally, that is going to change. The new regime is tantamount to a congested downtown area without stoplights. Gridlock is likely to result.

The majority is creating regulatory uncertainty for engineers. Under the new regulatory rubric of the undefined term “reasonable network management,” engineers do not know if they are allowed to manage your Internet experience so you can watch online video without distortion, pops, and hisses. Similarly, they now do not know what the government will allow them to do, or not do, to manage the growing flood of peer-to-peer applications. Here’s the problem: If you use cable modem or wireless broadband services, you may not know it, but you share bandwidth with your neighbor. That’s just the nature of these networks, many of which were built long before P2P became popular. If your neighbor uses more bandwidth, that leaves less for you to use. This is especially true when your neighbor uses peer-to-peer applications. Many P2P applications consume as much bandwidth as they can find. In fact, only five percent of all Internet consumers are using 90 percent of the bandwidth due to P2P. Some estimate that seventy-five percent of the world’s Internet traffic is P2P. As a result of increased P2P usage, many consumers’ “last mile” Internet connections are getting clogged. These electronic traffic jams slow down the Internet for the vast majority of consumers who do not use P2P software to watch videos on YouTube or surf the Web. In short, this flood of data has created a tyranny by a minority. By depriving engineers of the freedom to manage these surges of information flow by having to treat all traffic equally as the result of today’s order, the Information Superhighway could quickly become the Information Parking Lot. The regulatory law of unintended consequences is sure to prevail.

While we at the FCC are trying to spur more competitive build-out of vital last-mile facilities, especially fiber and wireless platforms, this congestion problem will not be resolved merely by building fatter and faster pipes. In fact, according to Japan’s government, P2P congestion is creating similar network management problems there even though that country advertises broadband speeds far in excess of ours.

The Internet has faced several congestion “crises” like the current one over the years. Each time, groups comprised of engineers, academics, software developers, Internet infrastructure builders and others have worked together to fix the problems of the day. Over time, some of these groups have become more formalized such as the Internet Society, the Internet Engineering Task Force and the Internet Architecture Board. These groups have remained largely self-governing, self-funded and non-profit – with volunteers acting in their own capacities and not on behalf of their employers. No government owns or regulates these groups; rather, governments can act as observers and collaborative partners. The Internet has been governed in a bottom-up “wiki” manner rather than a top-down government-knows-best style. The Internet has flourished as a result.

For quite some time now, these and other groups have been working on the P2P congestion problem, and they have been producing positive results. Since the Internet’s inception, similar work has progressed without a government mandate or regulatory framework. Now that era had ended.

For the first time, today our government is choosing regulation over collaboration when it comes to Internet governance. The majority has thrust politicians and bureaucrats into engineering decisions. It will be interesting to see how the FCC will handle its newly created power because, as an institution, we are incapable of deciding any issue in the nanoseconds of Internet time. Furthermore, asking our government to make these decisions will mean that every two to four years the ground rules could change depending on election results. Internet engineers will find it difficult, if not impossible, to operate in a climate like that. Today’s action is raising many questions across the globe. Is the next step for the FCC to mandate that network owners must ask the government for permission before serving their customers

by managing surges of information flow? As a result of today's actions, Internet lawyers around the country are likely advising their clients to do just that. Will the FCC be able to handle *that* case load? Will other countries like China follow suit and be able to regulate American companies' network management practices, with effects that could be felt here? How do we know where to draw the line given that the Internet is an interconnected global network of networks? Given the Internet's interconnectivity, are we now starting a global race to the lowest common denominator of maximum government regulation all in the name, ironically, of Internet *freedom*? Keep in mind that societies that regulate the Internet less tend to be more democratic, while regimes that regulate it more tend to be less democratic.

I am being asked these and many other questions, and I don't have answers to them. No one does. But two things are for sure, this debate will continue, and the FCC has generated more questions than it has answered.

A better model for the majority to have adopted today would have been to allow the long-standing and time-tested collaborative Internet governance groups to continue to produce the fine work they have successfully put forth for years. If they find themselves unable to agree (which has never happened – not even in this case before us), then the government should examine the situation and act accordingly. Perhaps the FCC could have created a new role for itself by spotlighting complaints of potentially nefarious network practices and conveying them to the IETF for collaborative review and action. Sometimes merely shining sunlight on controversies can produce amazingly beneficial effects.

In that vein, some have argued that without the complaint, the Comcast/BitTorrent matter would never have been settled last March. They may be correct. In the law, we call this a litigation strategy. Courts encourage litigants to settle their disputes before trial. Once settled, courts dismiss cases as part of a policy to encourage future settlements. Here the majority is doing the opposite. Even though Comcast and BitTorrent settled and pled for no further “government intervention,” the majority has gone forward with this adjudication. The net effect punishes those that settle and discourages future settlements.

So today, for the first time in Internet history, we say “goodbye” to the era of collaboration that served the Internet community and consumers so well for so long; and we say “hello” to unneeded regulation and all of its unintended consequences. Accordingly, I respectfully dissent.

**DISSENTING STATEMENT OF  
COMMISSIONER ROBERT M. McDOWELL**

Re: *Preserving the Open Internet*, GN Docket No. 09-191, *Broadband Industry Practices*,  
WC Docket No. 07-52

Thank you, Mr. Chairman. And thank you for your solicitousness throughout this proceeding. In the spirit of the holidays, with good will toward all, I will present a condensed version of a more in-depth statement, the entirety of which I respectfully request be included in this Report and Order.

At the outset, I would like to thank the selfless and tireless work of all of the career public servants here at the Commission who have worked long hours on this project. Although I strongly disagree with this Order, all of us should recognize and appreciate that you have spent time away from your families as you have worked through weekends, the holidays of Thanksgiving and Chanukah, as well as deep into the Christmas season. Such hours take their toll on family life, and I thank you for the sacrifices made by you and your loved ones.

For those who might be tuning in to the FCC for the first time, please know that over 90 percent of our actions are not only bipartisan, but unanimous. I challenge anyone to find another policy making body in Washington with a more consistent record of consensus. We agree that the Internet is, and should remain, open and freedom enhancing. It is, and always has been so, under existing law. Beyond that, we disagree. The contrasts between our perspectives could not be sharper. My colleagues and I will deliver our statements and cast our votes. Then I am confident that we will move on to other issues where we can find common ground once again. I look forward to working on public policy that is more positive and constructive for American economic growth and consumer choice.

William Shakespeare taught us in *The Tempest*, "What's past is prologue." That time-tested axiom applies to today's Commission action. In 2008, the FCC tried to reach beyond its legal authority to regulate the Internet, and it was slapped back by an appellate court only eight short months ago. Today, the Commission is choosing to ignore the recent past as it attempts the same act. In so doing, the FCC is not only defying a court, but it is circumventing the will of a large, bipartisan majority of Congress as well. More than 300 Members have warned the agency against exceeding its legal authority. The FCC is not Congress. We cannot make laws. Legislating is the sole domain of the directly *elected* representatives of the American people. Yet the majority is determined to ignore the growing chorus of voices emanating from Capitol Hill in what appears to some as an obsessive quest to regulate at all costs. Some are saying that, instead of acting as a "cop on the beat," the FCC looks more like a regulatory vigilante. Moreover, the agency is further angering Congress by ignoring increasing calls for a cessation of its actions and choosing, instead, to move ahead just as Members leave town. As a result, the FCC has provocatively charted a collision course with the legislative branch.

Furthermore, on the night of Friday, December 10, just two business days before the public would be prohibited by law from communicating further with us about this proceeding, the Commission dumped nearly 2,000 pages of documents into the record. As if that weren't enough, the FCC unloaded an additional 1,000 pages into the record less than 24 hours before the end of the public comment period. All of these extreme measures, defying the D.C. Circuit, Congress,

and undermining the public comment process, have been deployed to deliver on a misguided campaign promise.

Not only is today the winter solstice, the darkest day of the year, but it marks one of the darkest days in recent FCC history. I am disappointed in these “ends-justify-the-means” tactics and the doubts they have created about this agency. The FCC is capable of better. Today is not its finest hour.

Using these new rules as a weapon, politically favored companies will be able to pressure three political appointees to regulate their rivals to gain competitive advantages. Litigation will supplant innovation. Instead of investing in tomorrow’s technologies, precious capital will be diverted to pay lawyers’ fees. The era of Internet regulatory arbitrage has dawned.

And to say that today’s rules don’t regulate the Internet is like saying that regulating highway on-ramps, off-ramps, and its pavement doesn’t equate to regulating the highways themselves.

What had been bottom-up, non-governmental, and grassroots based Internet governance will become politicized. Today, the United States is abandoning the long-standing bipartisan and international consensus to insulate the Internet from state meddling in favor of a preference for top-down control by unelected political appointees, three of whom will decide what constitutes “reasonable” behavior. Through its actions, the majority is inviting countries around the globe to do the same thing. “Reasonable” is a subjective term. Not only is it perhaps the most litigated word in American history, its definition varies radically from country to country. The precedent has now been set for the Internet to be subjected to state interpretations of “reasonable” by governments of all stripes. In fact, at the United Nations just last Wednesday, a renewed effort by representatives from countries such as China and Saudi Arabia is calling for what one press account says is, “an international body made up of Government representatives that would attempt to create global standards for policing the internet.”<sup>1</sup> By not just sanctioning, but *encouraging* more state intrusion into the Internet’s affairs, the majority is fueling a global Internet regulatory pandemic. Internet freedom will not be enhanced, it will suffer.

My dissent is based on four primary concerns:

- 1) Nothing is broken in the Internet access market that needs fixing;
- 2) The FCC does not have the legal authority to issue these rules;
- 3) The proposed rules are likely to cause irreparable harm; and
- 4) Existing law and Internet governance structures provide ample consumer protection in the event a systemic market failure occurs.

Before I go further, however, I apologize if my statement does not address some important issues raised by the Order, but we received the current draft at 11:42 p.m. last night and my team is still combing through it.

<sup>1</sup> John Hilvert, *UN Mulls Internet Regulation Options*, ITNEWS, Dec. 17, 2010, <http://www.itnews.com.au/News/242051,un-mulls-internet-regulation-options.aspx>.

# **I. Nothing Is Broken in the Internet Access Market That Needs Fixing.**

All levels of the Internet supply chain are thriving due to robust competition and low market entry barriers. The Internet has flourished because it was privatized in 1994.<sup>2</sup> Since then, it has migrated further away from government control. Its success was the result of bottom-up collaboration, not top-down regulation. No one needs permission to start a website or navigate the Web freely. To suggest otherwise is nothing short of fear mongering.

Myriad suppliers of Internet related devices, applications, online services and connectivity are driving productivity and job growth in our country. About eighty percent of Americans own a personal computer.<sup>3</sup> Most are connected to the Internet. In the meantime, the Internet is going mobile. By this time next year, consumers will see more smartphones in the U.S. market than feature phones.<sup>4</sup> In addition to countless applications used on PCs, growth in the number of mobile applications available to consumers has gone from nearly zero in 2007 to half a million just three years later.<sup>5</sup> Mobile app downloads are growing at an annual rate of 92 percent, with an estimated 50 billion applications expected to be downloaded in 2012.<sup>6</sup>

Fixed and mobile broadband Internet access is the fastest penetrating disruptive technology in history. In 2003, only 15 percent of Americans had access to broadband. Just seven years later, 95 percent do.<sup>7</sup> Eight announced national broadband providers are building out facilities in addition to the construction work of scores more local and regional providers. More competition is on the way as providers light up recently auctioned spectrum. Furthermore, the Commission's work to make unlicensed use of the television "white spaces" available to consumers will create even more competition and consumer choice.

In short, competition, investment, innovation, productivity, and job growth are healthy and dynamic in the Internet sector thanks to bipartisan, deregulatory policies that have spanned four decades. The Internet has blossomed under *current law*.

Policies that promote abundance and competition, rather than the rationing and unintended consequences that come with regulation, are the best antidotes to the potential

<sup>2</sup> And at this juncture, I need to dispel a pervasive myth that broadband was once regulated like a phone company. The FCC's 2002 cable modem order did not move broadband from Title II. It formalized an effort to insulate broadband from antiquated regulations, like those adopted today, that started under then-FCC Chairman Bill Kennard. Furthermore, after the Supreme Court's *Brand X* decision, all of the FCC votes to classify broadband technologies as information services were bipartisan. A more thorough history is attached to this dissent as "Attachment A".

<sup>3</sup> See Aaron Smith, Pew Internet & American Life Project, *Americans and their gadgets* (Oct. 14, 2010) at 2, 5, 9 (76 percent of Americans own either a desktop or laptop computer; 4 percent of Americans have "tablet computers").

<sup>4</sup> Roger Entner, Nielsenwire, *Smartphones to Overtake Feature Phones in U.S. by 2011* (Mar. 26, 2010).

<sup>5</sup> See Distimo, GigaOm, Softpedia (links at: <http://www.distimo.com/appstores/stores/index/country:226>; <http://gigaom.com/2010/10/25/android-market-clears-100000-apps-milestone/>; and <http://news.softpedia.com/news/4-000-Apps-in-Windows-Phone-Marketplace-171764.shtml>).

<sup>6</sup> See Chetan Sharma, *Sizing Up the Global Mobile Apps Market* (2010) at 3, 9.

<sup>7</sup> Federal Communications Commission, *Connecting America: The National Broadband Plan* at 20 (rel. Mar. 16, 2010) (*National Broadband Plan*).



anticompetitive behavior feared by the rules' proponents. But don't take my word for it. Every time the government has examined the broadband market, its experts have concluded that no evidence of concentrations or abuses of market power exists. The Federal Trade Commission (FTC), one of the premier antitrust authorities in government, not only concluded that the broadband market was competitive, but it also warned that regulators should be "wary" of network management rules because of the unknown "net effects ... on consumers."<sup>8</sup> The FTC rendered that unanimous and bipartisan conclusion in 2007. As I discussed earlier, the broadband market has become only more competitive since then.

More recently, the Department of Justice's Antitrust Division reached a similar conclusion when it filed comments with us earlier this year.<sup>9</sup> While it sounded optimistic regarding the prospects for broadband competition, it also warned against the temptation to regulate "to avoid stifling the infrastructure investments needed to expand broadband access."<sup>10</sup>

Disturbingly, the Commission is taking its radical step today without conducting even a rudimentary market analysis. Perhaps that is because a market study would not support the Order's predetermined conclusion.

## II. The FCC Does Not Have the Legal Authority to Issue These Rules.

Time does not allow me to refute all of the legal arguments in the Order used to justify its claim of authority to regulate the Internet. I have included a more thorough analysis in the supplemental section of this statement, however. Nonetheless, I will touch on a few of the legal arguments endorsed by the majority.

Overall, the Order is designed to circumvent the D.C. Circuit's *Comcast* decision,<sup>11</sup> but this new effort will fail in court as well. The Order makes a first-time claim that somehow, through the deregulatory bent of Section 706, in 1996 Congress gave the Commission *direct* authority to regulate the Internet. The Order admits that its rationale requires the Commission to reverse its longstanding interpretation that this section conveys no additional authority beyond what is already provided elsewhere in the Act.<sup>12</sup> This new conclusion, however, is suddenly convenient for the majority while it grasps for a foundation for its predetermined outcome. Instead of "*remov[ing]* barriers to infrastructure investment," as Section 706 encourages, the Order fashions a legal fiction to construct *additional* barriers. This move is arbitrary and capricious and is not supported by the evidence in the record or a change of law.<sup>13</sup> The

<sup>8</sup> Federal Trade Commission, Internet Access Task Force, Broadband Connectivity Competition Policy FTC Staff Report (rel. June 27, 2007) at 157.

<sup>9</sup> See *Ex Parte* Submission of the U.S. Dept. of Justice, GN Docket No. 09-51 (dated Jan. 4, 2010).

<sup>10</sup> *Id.* at 28.

<sup>11</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>12</sup> Order, ¶ 118.

<sup>13</sup> While it is true that an agency may reverse its position, "the agency must show that there are good reasons." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Moreover, while *Fox* held that "[t]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," the Court noted that "[s]ometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior

(continued....)

Commission's gamesmanship with Section 706 throughout the year is reminiscent of what was attempted with the contortions of the so-called "70/70 rule" three years ago. I objected to such factual and legal manipulations then, and I object to them now.

Furthermore, the Order desperately scours the Act to find a tether to moor its alleged Title I ancillary authority. As expected, the Order's legal analysis ignores the fundamental teaching of the *Comcast* case: Titles II, III, and VI of the Communications Act give the FCC the power to regulate specific, recognized classes of electronic communications services, which consist of common carriage telephony, broadcasting and other licensed wireless services, and multichannel video programming services.<sup>14</sup> Despite the desires of some, Congress has *not* established a new title of the Act to police Internet network management, not even implicitly. The absence of statutory authority is perhaps why Members of Congress introduced legislation to give the FCC such powers. In other words, if the Act already gave the Commission the legal tether it seeks, why was legislation needed in the first place? I'm afraid that this leaky ship of an Order is attempting to sail through a regulatory fog without the necessary ballast of factual or legal substance. The courts will easily sink it.

In another act of legal sleight of hand, the Order claims that it does not attempt to classify broadband services as Title II common carrier services. Yet functionally, that is precisely what the majority is attempting to do to Title I information services, Title III licensed wireless services, and Title VI video services by subjecting them to nondiscrimination obligations in the absence of a congressional mandate. What we have before us today is a Title II Order dressed in a threadbare Title I disguise. Thankfully, the courts have seen this bait-and-switch maneuver by the FCC before – and they have struck it down each time.<sup>15</sup>

(...continued from previous page)

policy has engendered serious reliance interest that must be taken into account." *Id.* (internal citations omitted).

<sup>14</sup> The D.C. Circuit in *Comcast* set forth this framework in very plain English:

Through the Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended over the decades, 47 U.S.C. § 151 *et seq.*, Congress has given the Commission express and expansive authority to regulate common carrier services, including landline telephony, *id.* § 201 *et seq.* (Title II of the Act); radio transmissions, including broadcast television, radio, and cellular telephony, *id.* § 301 *et seq.* (Title III); and "cable services," including cable television, *id.* § 521 *et seq.* (Title VI). In this case, the Commission does not claim that Congress has given it express authority to regulate Comcast's Internet service. Indeed, in its still-binding 2002 *Cable Modem Order*, the Commission ruled that cable Internet service is neither a "telecommunications service" covered by Title II of the Communications Act nor a "cable service" covered by Title VI. *In re High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802, P 7 (2002), *aff'd* *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

600 F.3d at 645.

<sup>15</sup> *See, e.g., id.; FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest II*).

The Order's expansive grasp for jurisdictional power here is likely to alarm any reviewing court because the effort appears to have no limiting principle.<sup>16</sup> If we were to accept the Order's argument, "it would virtually free the Commission from its congressional tether."<sup>17</sup> "As the [Supreme] Court explained in *Midwest Video II*, 'without reference to the provisions of the Act' expressly granting regulatory authority, 'the Commission's [ancillary] jurisdiction ... would be unbounded.'"<sup>18</sup> I am relieved, however, that in the Order, the Commission is explicitly refraining from regulating coffee shops.<sup>19</sup>

In short, if this Order stands, there is no end in sight to the Commission's powers.

I also have concerns regarding the constitutional implications of the Order, especially its trampling on the First and Fifth Amendments. But in the observance of time, those thoughts are contained in my extended written remarks.

### III. The Commission's Rules Will Cause Irreparable Harm to Broadband Investment and Consumers.

DOJ's cogent observation from last January regarding the competitive nature of the broadband market raises the important issue of the likely irreparable harm to be brought about by these new rules. In addition to government agencies, investors, investment analysts, and broadband companies themselves have told us that network management rules would create uncertainty to the point where crucial investment capital will become harder to find. This point was made over and over again at the FCC's Capital Formation Workshop on October 1, 2009. A diverse gathering of investors and analysts told us that even rules emanating from Title I would create uncertainty. Other evidence suggests that Internet management rules could not only make it difficult for companies to "predict their revenues and cash flow," but a new regime could "have the perverse effect of raising prices to all users" as well.<sup>20</sup>

Additionally, today's Order implies that the FCC has price regulation authority over broadband. In fact, the D.C. Circuit noted in its *Comcast* decision last spring that the Commission's attorneys openly asserted at January's oral argument that "the Commission could someday subject [broadband] service to pervasive rate regulation to ensure that ... [a broadband] company provides the service at 'reasonable charges.'"<sup>21</sup> Nothing indicates that the Commission

<sup>16</sup> For example, in the *Comcast* case, FCC counsel conceded at oral argument that the ancillary jurisdiction argument there could even encompass rate regulation, if the Commission chose to pursue that path. *Id.* at 655 (referring to Oral Arg. Tr. 58-59).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (quoting *Midwest Video II*, 440 U.S. at 706).

<sup>19</sup> Order, ¶ 52.

<sup>20</sup> Howard Buskirk, *Investors, Analysts Uneasy About FCC Direction on Net Neutrality*, COMM. DAILY, Oct. 2, 2009, at 2; see also National Cable & Telecommunications Association Comments at 19; Verizon and Verizon Wireless Reply Comments at 17-18.

<sup>21</sup> *Comcast*, 600 F.3d at 655 (referring to Oral Arg. Tr. 58-59).

has changed its mind since then. In fact, the Order appears to support both indirect and direct price regulation of broadband services.<sup>22</sup>

Moreover, as lobbying groups accept this Order's invitation to file complaints asking the government to distort the market further the Commission will be under increasing pressure from political interest groups to expand its power and influence over the broadband Internet market. In fact, some of my colleagues today are complaining that the Order doesn't go far enough. Each complaint filed will create more uncertainty as the enforcement process becomes a *de facto* rulemaking circus, just as the Commission attempted in the ill-fated *Comcast/BitTorrent* case.<sup>23</sup> How does this framework create regulatory certainty?<sup>24</sup> Even the European Commission recognized the harm such rules could cause to the capital markets when it decided last month *not* to impose measures similar to these.<sup>25</sup>

Part of the argument in favor of new rules alleges that "giant corporations" will serve as hostile "gatekeepers" to the Internet. First, in the almost nine years since those fears were first sewn, net regulation lobbyists can point to fewer than a handful of cases of alleged misconduct, out of an infinite number of Internet communications. *All* of those cases were resolved in favor of consumers under *current* law.

More importantly, however, many broadband providers are not large companies. Many are small businesses. Take, for example, LARIAT, a fixed wireless Internet service provider serving rural communities in Wyoming. LARIAT has told the Commission that the imposition of network management rules will impede its ability to obtain investment capital and will limit the company's "ability to deploy new service to currently unserved and underserved areas."<sup>26</sup> Furthermore, LARIAT echoes the views of many others by asserting that, "[t]he imposition of regulations that would drive up costs or hamper innovation would further deter future outside investment in our company and others like it."<sup>27</sup> Additionally, "[t]o mandate overly [burdensome] network management policies would foster lower quality of service, raise operating costs (which in turn would raise prices for all subscribers), and/or create a large backlog of adjudicative proceedings at the Commission (in which it would be prohibitively expensive for

<sup>22</sup> See, e.g., Order, ¶ 76.

<sup>23</sup> See *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, File No. EB-08-IH-1518, Memorandum Opinion and Order, 23 FCC Rcd. 13,028 (2008) (*Comcast Order*). Comcast and BitTorrent settled their dispute, in the absence of net neutrality rules, four months before the Commission issued its legally flawed order. See, e.g., David Kirkpatrick, *Comcast-BitTorrent: The Net's Finally Growing Up*, CNN.COM, Mar. 28, 2008, at <http://money.cnn.com/2008/03/27/technology/comcast.fortune/index.htm>

<sup>24</sup> Furthermore, as Commissioner Baker has noted, with this Order the Commission is inviting parties to file petitions for declaratory rulings, which will likely result in competitors asking the government to regulate their rivals in advance of market action. I am hard pressed to find a better example of a "mother-may-I" paternalistic industrial policy making apparatus.

<sup>25</sup> Neelie Kroes, Vice President for the Digital Age, European Commission, Net Neutrality – The Way Forward: European Commission and European Parliament Summit on "The Open Internet and Net Neutrality in Europe" (Nov. 11, 2010).

<sup>26</sup> LARIAT Comments at 2-3.

<sup>27</sup> *Id.* at 3.

*small and competitive ISPs to participate*)”.<sup>28</sup> LARIAT also notes that the imposition of net neutrality rules would cause immediate harm such that “[d]ue to immediate deleterious impacts upon investment, these damaging effects would be likely to occur even if the Commission’s Order was later invalidated, nullified, or effectively modified by a court challenge or Congressional action.”<sup>29</sup> Other small businesses have echoed these concerns.<sup>30</sup>

Less investment. Less innovation. Increased business costs. Increased prices for consumers. Disadvantages to smaller ISPs. Jobs lost. And all of this is in the name of promoting the exact opposite? The evidence in the record simply does not support the majority’s outcome driven conclusions.

In short, the Commission’s action today runs directly counter to the laudable broadband deployment and adoption goals of the National Broadband Plan. No government has ever succeeded in mandating investment and innovation. And nothing has been holding back Internet investment and innovation, until now.

#### **IV. Existing Law Provides Ample Consumer Protection.**

To reiterate, the Order fails to put forth either a factual or legal basis for regulatory intervention. Repeated government economic analyses have reached the same conclusion: no concentrations or abuses of market power exist in the broadband space. If market failure were to occur, however, America’s antitrust and consumer protection laws stand at the ready. Both the Department of Justice and the Federal Trade Commission are well equipped to cure any market ills.<sup>31</sup> In fact, the Antitrust Law Section of the American Bar Association agrees.<sup>32</sup> Nowhere does the Order attempt to explain why these laws are insufficient in its quest for more regulation.

<sup>28</sup> *Id.* at 5 (emphasis added).

<sup>29</sup> Letter from Brett Glass, d/b/a LARIAT, to Julius Genachowski, Chairman, FCC, *et al.*, at 2 (Dec. 9, 2010) (LARIAT Dec. 9 Letter).

<sup>30</sup> *See, e.g.*, Letter from Paul Conlin, President, Blaze Broadband, to Marlene H. Dortch, Secretary (Dec. 14, 2010) (Blaze Broadband Dec. 14 Letter).

<sup>31</sup> Section 2 of the Sherman Act, 15 U.S.C. § 2, prohibits conduct that would lead to monopolization. In the event of abuse of market power, this is the main statute that enforcers would use. In the context of potential abuses by broadband Internet access service providers, this statute would forbid: (1) Exclusive dealing – for example, the only way a consumer could obtain streaming video is from a broadband provider’s preferred partner site; (2) Refusals to deal (the other side of the exclusive dealing coin) – *i.e.*, if a cable company were to assert that the only way a content delivery network could interconnect with it to stream unaffiliated video content to its customers would be to pay \$1 million/port/month, such action could constitute a “constructive” refusal to deal if any other content delivery network could deliver any other traffic for a \$1,000/port/month price; and (3) Raising rivals’ costs – achieving essentially the same results using different techniques.

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, essentially accomplishes the same curative result, only through the FTC. It generally forbids “unfair competition.” This is an effective statute to empower FTC enforcement as long as Internet access service is considered an “information service.” The FTC Act explicitly does not apply to “common carriers.”

*See also*, 15 U.S.C. §13(a), *et seq.*

<sup>32</sup> ABA Comment on Federal Trade Commission Workshop: Broadband Connectivity Competition Policy, 195 Project No. V070000 (2007).

Moreover, for several years now, I have been advocating a potentially effective approach that won't get overturned on appeal. In lieu of new rules, which will be tied up in court for years, the FCC could create a new role for itself by partnering with already established, non-governmental Internet governance groups, engineers, consumer groups, academics, economists, antitrust experts, consumer protection agencies, industry associations, and others to spotlight allegations of anticompetitive conduct in the broadband market, and work *together* to resolve them. Since it was privatized, Internet governance has always been based on a foundation of bottom-up collaboration and cooperation rather than top-down regulation. This truly "light touch" approach has created a near-perfect track record of resolving Internet management conflicts without government intervention.

Unfortunately, the majority has not even considered this idea for a moment. But once today's Order is overturned in court, it is still my hope that the FCC will consider and adopt this constructive proposal.

In sum, what's past is indeed prologue. Where we left the saga of the FCC's last net neutrality order before was with a spectacular failure in the appellate courts. Today, the FCC seems determined to make the same mistake instead of learning from it. The only illness apparent from this Order is regulatory hubris. Fortunately, cures for this malady are obtainable in court. For all of the foregoing reasons, I respectfully dissent.

\* \* \*

*Extended Legal Analysis:*  
**The Commission Lacks Authority to Impose  
 Network Management Mandates on Broadband Networks.**

The Order is designed to circumvent the effect of the D.C. Circuit's *Comcast* decision,<sup>33</sup> but that effort will fail. Careful consideration of the Order shows that its legal analysis ignores the fundamental teaching of *Comcast*: Titles II, III, and VI of the Communications Act regulate specific, recognized classes of electronic communications services, which consist of common carriage telephony, broadcasting and other licensed wireless services, and multichannel video programming services.<sup>34</sup> Despite any policy desires to the contrary, Congress has not yet

<sup>33</sup> *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

<sup>34</sup> The D.C. Circuit in *Comcast* set forth this framework in very plain English:

Through the Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended over the decades, 47 U.S.C. § 151 *et seq.*, Congress has given the Commission express and expansive authority to regulate common carrier services, including landline telephony, *id.* § 201 *et seq.* (Title II of the Act); radio transmissions, including broadcast television, radio, and cellular telephony, *id.* § 301 *et seq.* (Title III); and "cable services," including cable television, *id.* § 521 *et seq.* (Title VI). In this case, the Commission does not claim that Congress has given it express authority to regulate Comcast's Internet service. Indeed, in its still-binding 2002 *Cable Modem Order*, the Commission ruled that cable Internet service is neither a "telecommunications service" covered by Title II of the Communications Act nor a "cable service" covered by Title VI. *In re High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802, P 7 (2002), *aff'd Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

600 F.3d at 645.

established a new title of the Act to govern some or all parts of the Internet – which includes the operation, or “management,” of the networks that support the Internet’s functioning as a new and highly complex communications platform for diverse and interactive data, voice, and video services. Until such time as lawmakers may act, the Commission has no power to regulate Internet network management.

As detailed below, the provisions of existing law upon which the Order relies afford the Commission neither direct nor ancillary authority here. The tortured logic needed to support the Order’s conclusion requires that the agency either reverse its own interpretation of its statutorily granted express powers or rely on sweeping pronouncements of ancillary authority that lack any “congressional tether” to specific provisions of the Act.<sup>35</sup> Either path will fail in court.

Instead, the judicial panel that ends up reviewing the inevitable challenges is highly likely to recognize this effort for what it is. While ostensibly eschewing reclassification of broadband networks as Title II platforms, the Order imposes the most basic of all common carriage mandates: nondiscrimination, albeit with a vague “we’ll know it when we see it” caveat for “reasonable” network management. This may be only a pale version of common carriage (at least for now), but it is still quite discernible even to the untrained eye.

**A. Reversal of the Commission’s Interpretation of Section 706 Cannot Provide Direct Authority for Network Management Rules.**

Less than one year ago, the Commission in attempting to defend its *Comcast/BitTorrent* decision at the D.C. Circuit “[a]cknowledged that it has no express statutory authority over [an Internet service provider’s network management] practices.”<sup>36</sup> The Commission was right then, and the Order is wrong now. Congress has never contemplated, much less enacted, a regulatory scheme for broadband network management, notwithstanding the significant revision of the Communications Act undertaken through the Telecommunications Act of 1996 (1996 Act).<sup>37</sup> It is an exercise in legal fiction to contend otherwise.

Any analysis of an arguable basis for the Commission’s power to act in this area must begin with the recognition that broadband Internet access service remains an unregulated “information service” under Title I of the Communications Act.<sup>38</sup> Overtly, the Order does not

<sup>35</sup> *Id.* at 655.

<sup>36</sup> *Id.* at 644.

<sup>37</sup> The scattered references to the Internet and advanced services in a few provisions of the 1996 Act, *see, e.g.*, 47 U.S.C. §§ 230, 254, do not constitute a congressional effort to systemically regulate the management of the new medium. A better reading of the 1996 Act in this regard is that Congress recognized that the emergence of the Internet meant that something new, exciting, and yet still amorphous was coming. Rather than act prematurely by establishing a detailed new regulatory scheme for the Net, Congress chose to leave the Net unregulated at that time.

<sup>38</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4,798 (2002) (*Cable Modem Declaratory Ruling*); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14,853 (2005) (*Wireline Broadband Order*); *Appropriate Regulatory Treatment* (continued....)

purport to change this legal classification.<sup>39</sup> Yet a reviewing court will look beyond the Order's characterization of the Commission's action to scrutinize what the new codified rules – and the directives and warnings set forth in the text – actually do.<sup>40</sup> Dispassionate analysis will lead to the conclusion that the Order attempts to relegate this type of information service to common carriage by effectively applying major Title II obligations to it. The Title I disguise will not be convincing.

The threadbare nature of the disguise becomes clear with scrutiny of the Order's claims for a legal basis for the new regulations. The Order's only serious effort to assert direct authority is based on Section 706.<sup>41</sup> The Order glosses over the key point that no language within Section 706 – or anywhere else in the Act, for that matter – bestows the FCC with explicit authority to regulate Internet network management. Rather, Section 706's explicit focus is on “deployment” and “availability” of broadband network facilities.<sup>42</sup> So what precisely is the nexus between Section 706's focus on broadband deployment and availability and the Order's focus on network management once the facilities *have been* deployed and the service *is* available? The Order seems to imply that Section 706 somehow provides the Commission with network management authority because if the government lacks such power, some American might have less access to the Internet. This rationale is contrary to the provision's language and illogical on its face. Imposing new regulations on network providers in the business of deploying broadband<sup>43</sup> will have the opposite effect of what Section 706 seeks to do. Instead, the imposition of network management rules will likely depress investment in deployment of broadband throughout our nation.<sup>44</sup> This outcome will prove true not simply for the large providers tracked by Wall Street

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for *Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Red. 5,901 (2007) (*Wireless Broadband Order*).

<sup>39</sup> Order, ¶¶ 121-23.

<sup>40</sup> See, e.g., *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (“in the context of reviewing a decision ... courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information.”).

<sup>41</sup> To the degree that the Order suggests that other sections in the Act provide it with direct authority to impose new Internet network management rules, such arguments are not legally sustainable. For the reasons set forth in Section B of this extended legal analysis, *infra*, the claimed bases for extending even ancillary authority are unconvincing, which renders contentions about direct authority untenable.

<sup>42</sup> 47 U.S.C. §§ 1302 (a), (b).

<sup>43</sup> The National Broadband Plan even noted that, “[d]ue in large part to private investment and market-driven innovation, broadband in America has improved considerably in the last decade.” Federal Communications Commission, *Connecting America: The National Broadband Plan* at 3 (rel. Mar. 16, 2010) (*National Broadband Plan*). Note that during this same time period of investment, no network management rules existed.

<sup>44</sup> The Commission has been warned about this consequence many times in the recent past. For example, during the Commission's October 2009 Capital Formation Workshop, several investment professionals raised red flags about a Title I approach to Internet regulation. Trade press accounts reported Chris King, an analyst at Stifel Nicolaus, as saying that “[w]hen you look at the telecom sector or cable sector, one of the things that scares them to death is net neutrality.... Any regulation that would limit severely [Verizon's and AT&T's] ability to control their own networks to manage traffic of their own networks could certainly have a negative role in their levels of investment going forward.” Howard Buskirk, *Investors, Analysts Uneasy About FCC Direction on Net Neutrality*, COMM. DAILY, Oct. 2, 2009, at 1. Similarly, Tom Aust, a (continued....)



analysts but for the small businesses that supply vital and competitive broadband options to consumers in many locales across the nation.<sup>45</sup>

A closer reading of the statutory text bears out this assessment. Turning specifically to the language of Section 706(a), the provision opens with a policy pronouncement that the Commission “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”<sup>46</sup> As *Comcast* already has pointed out, “under Supreme Court and D.C. Circuit case law statements of policy, by themselves, do not create ‘statutorily mandated responsibilities.’”<sup>47</sup> Rather, “[p]olicy statements are just that – statements of policy. They are not delegations of regulatory authority.”<sup>48</sup> The same holds true for congressional statements of policy, such as the opening of Section 706, as it does for any agency’s policy pronouncements.

The Order makes a strenuous effort to argue that Section 706 is not limited to deregulatory actions, a herculean task taken on because the Order rests nearly all of its heavy weight on this thin foundation.<sup>49</sup> Section 706 does refer to one specific regulatory provision –

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senior analyst at GE Asset Management, stated that regulatory risk is “ultimately unknowable because it’s so broad and it can be so quick. For a company it means that they can’t predict their revenues and cash flows as well, near or long term.” *Id.* at 2.

<sup>45</sup> Network management regulations will affect the investment outlook for transmission providers large and small. In the latter category, Brett Glass, the sole proprietor of LARIAT, a wireless Internet service provider in Wyoming, has filed comments expressing concern that the imposition of network management rules will impede his ability to obtain investment and will limit his “ability to deploy new service to currently unserved and underserved areas.” LARIAT Comments at 2–3. He stated that “[t]he imposition of regulations that would drive up costs or hamper innovation would further deter future outside investment in our company and others like it.” *Id.* at 3. Specifically, he argues that “[t]o mandate overly [burdensome] network management policies would foster lower quality of service, raise operating costs (which in turn would raise prices for all subscribers), and/or create a large backlog of adjudicative proceedings at the Commission (in which it would be prohibitively expensive for small and competitive ISPs to participate).” *Id.* at 5. “Due to immediate deleterious impacts upon investment, these damaging effects would be likely to occur even if the Commission’s Order was later invalidated, nullified, or effectively modified by a court challenge or Congressional action.” Letter from Brett Glass, d/b/a LARIAT, to Julius Genachowski, Chairman, FCC, *et al.*, at 2 (Dec. 9, 2010) (Glass Dec. 9 Letter). See also Letter from Paul Conlin, President, Blaze Broadband, to Marlene H. Dortch, Secretary (Dec. 14, 2010) (Blaze Broadband Dec. 14 Letter).

<sup>46</sup> 47 U.S.C. § 1302(a).

<sup>47</sup> *Comcast*, 600 F.3d at 644.

<sup>48</sup> *Id.* at 654.

<sup>49</sup> In support of its jurisdictional arguments, the Order cites to language in *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009). In that case, the D.C. Circuit does, in fact, state that “[t]he general and generous phrasing of § 706 means that the FCC possesses significant albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband – a statutory reality that assumes great importance when parties implore courts to overrule FCC decisions on this topic.” *Ad Hoc Telecomms.*, 572 F.3d at 906–07. But, there are several reasons why that statement in *Ad Hoc Telecomms.* cannot be used for the proposition that Section 706 provides the FCC with the authority to impose network management rules. First, it is notable that the petitioners in *Ad Hoc Telecomms.* were challenging one of the FCC’s forbearance decisions. As such, the FCC was not relying on Section 706 authority *alone* in that case, it was also relying on its forbearance authority which is specifically delegated

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price cap regulation.<sup>50</sup> Readers should keep in mind, however, that at the time Section 706 was enacted, 1996, price cap regulation of incumbent local exchange carriers was considered to be *deregulatory* when compared to the legacy alternative: rate-of-return regulation. The provision's remaining language is even more broad and deregulatory. For instance, the end of section 706(a) states that the FCC should explore "other regulating methods that *remove barriers to infrastructure investment*."<sup>51</sup> Additionally, its counterpart subsection, Section 706(b), states that if the FCC's annual inquiry determines that advanced telecommunications is not "being deployed to all Americans in a reasonable and timely fashion" the FCC shall take action to "*remove[e] barriers to infrastructure investment and ... promot[e] competition in the telecommunications market*."<sup>52</sup> As discussed above, the Order's actions will have the opposite effect.

Moreover, the Order's new interpretation of Section 706(a) is self serving and outcome determinative. The Order admits that its rationale requires reversing the Commission's longstanding interpretation of that subsection as conveying no authority beyond that already provided elsewhere in the Act.<sup>53</sup> This arbitrary and capricious move is not supported by evidence in the record or a change in law.<sup>54</sup> The Order offers the excuse that "[i]n the particular

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to the FCC pursuant to Section 10. The D.C. Circuit made this point in *Comcast*, when it rejected the FCC's use of *Ad Hoc Telecomms.* for its Section 706 authority arguments. *Comcast*, 600 F.3d at 659 ("In [*Ad Hoc Telecomms.*], however, we cited section 706 merely to support the Commission's choice between regulatory approaches clearly within its *statutory authority under other sections of the Act*." (emphasis added). Second, the text of Section 706(a) actually lists "regulatory forbearance" as an example of one of the tools that the FCC may employ in order to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 47 U.S.C. § 1302(a). By contrast, network management regulations are not listed in Section 706 or anywhere else in the Act. Finally, as the D.C. Court reiterated in *Comcast*, 600 F.3d at 659, the central issue that it focused on in *Ad Hoc Telecomms.* was not jurisdictional; rather it was whether the FCC's underlying forbearance decision had been arbitrary and capricious, specifically "when and how much" can the FCC forbear from Title II obligations. *Ad Hoc Telecomms.*, 572 F.3d at 904. Moreover, the court was very clear in noting that such authority was "not unfettered." *Id.* at 907.

<sup>50</sup> On that note, the Order even highlights the fact that "706(a) expressly contemplates the use of "regulating methods" such as price regulation." See Order, n. 381. This aside is an unsettling foreshadow of how these rules could be used to regulate broadband rates in the future, through either *ad hoc* enforcement cases or declaratory rulings.

<sup>51</sup> 47 U.S.C. § 1302(a) (emphasis added). This focus on infrastructure investment makes sense in light of Congress' express concern that broadband facilities quickly reach "elementary and secondary schools and classrooms," *id.*, which in 1996 may have lacked the economic appeal of business and residential districts as early targets for infrastructure upgrades.

<sup>52</sup> 47 U.S.C. § 1302(b).

<sup>53</sup> Order, ¶ 120.

<sup>54</sup> While it is true that an agency may reverse its position, "the agency must show that there are good reasons." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Moreover, while *Fox* held that "[t]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," the Court noted that "[s]ometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interest that must be taken into account." *Id.* (internal citations omitted). This warning is thrown into sharp focus by the billions of dollars invested in broadband

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proceedings prior to *Comcast*, setting out the understanding of Section 706(a) that we articulate in this Order would not meaningfully have increased the authority that we understood the Commission already to possess.”<sup>55</sup> In other words, apparently, the agency’s confused understanding of the limits of its ancillary authority meant that the Commission then did not have to rest on Section 706(a) in order to overreach by “pursu[ing] a stand-alone policy objective” not moored to “a specifically delegated power.”<sup>56</sup>

The Order’s reliance on Section 706(b) as providing a statutory foundation for network management regulations is similarly flawed. That subsection requires that the FCC determine on an annual basis whether “advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.”<sup>57</sup> Congress then further directed the Commission, if the agency’s determination were negative, to “take immediate action to accelerate deployment of such capability by *removing barriers to infrastructure investment* and by promoting competition in the telecommunications market” (emphasis added).<sup>58</sup>

To justify its use of this trigger, the Order points to the fact that approximately six months ago, the Commission on a divided 3-2 vote issued a report finding – for the first time in history – that “broadband deployment to all Americans is not reasonable and timely.”<sup>59</sup> This determination, in conflict with all previous reports dating back to 1999, was both perplexing and unsettling. It ignored the impressive strides the nation has made in developing and deploying broadband infrastructure and services since issuance of the first 706 Report. Amazingly enough, the most recent 706 Report managed to find failure even while pointing to data (first made public in the National Broadband Plan) showing that “95% of the U.S. population lives in housing units with access to terrestrial, fixed broadband infrastructure capable of supporting actual download speeds of at least 4 Mbps.”<sup>60</sup> In fact, only 15 percent of Americans had access to residential broadband services in 2003.<sup>61</sup> Only seven years later, 95 percent enjoyed access, making

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infrastructure since the Commission first began enunciating its decisions against Title II classification of broadband Internet networks. See, e.g., AT&T Comments at 19; Verizon Comments at 22.

<sup>55</sup> See Order, ¶ 122; see also *Comcast Corp. v. FCC*, 600 F.3d 642, 658 (D.C. Cir. 2010) (noting that “[i]n an earlier, still binding order, however, the Commission ruled that section 706 ‘does not constitute an independent grant of authority.’” (quoting *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, 13 FCC Red. 24,012, 24,047 ¶ 77 (1988)).

<sup>56</sup> *Comcast*, 600 F.3d at 659.

<sup>57</sup> 47 U.S.C. § 1302(b).

<sup>58</sup> *Id.*

<sup>59</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 09-137, Sixth Broadband Deployment Report, 25 FCC Red. 9,556, 9,558 ¶¶ 2–3 (2010). Commissioner Baker and I dissented from the July 2010 adoption of the latest Section 706 Report.

<sup>60</sup> *National Broadband Plan* at 20.

<sup>61</sup> See John Horrigan, Pew Internet and American Life Project, *Home Broadband Adoption 2009*, 11 (2009).

broadband the fastest penetrating disruptive technology in history.<sup>62</sup> At the time that I dissented from the 706 Report, I expressed concern that its findings could be a pretext for justifying additional regulation, rather than “removing barriers to infrastructure investment.”<sup>63</sup> Unfortunately, this Order reveals that my fears were well founded.

One is left to wonder where this assertion of power, if left unchecked, may lead next.<sup>64</sup> As for the Order itself, the short-term path is clear: It will be challenged in court. Once there, the Commission must struggle with the fact that the empirical evidence in this docket demonstrates “no relationship whatever” between the plain meaning of Section 706 and the network management rules being adopted.<sup>65</sup>

**B. Efforts to Advance New Arguments for Exercising Ancillary Authority Will Not Survive Court Review.**

In spite of the D.C. Circuit’s decision in *Comcast*, the Order attempts to continue to assert ancillary authority as another basis for its imposition of network management rules. To bolster the Commission’s case this time, the Order points to some provisions of the Act that it failed to cite the first time around. Its arguments for new and putatively better bases for network management rules fall victim largely to the same weaknesses the court identified before.

Efforts to defend a valid exercise of the agency’s ancillary powers are subject to a two-part test – and the “central issue,” as the D.C. Circuit already has explained, is whether the Commission can satisfy the second prong of the test.<sup>66</sup> Under it, “[t]he Commission may exercise this ‘ancillary’ authority only if it demonstrates that its action ... is ‘reasonably ancillary to the ... effective performance of its statutorily mandated responsibilities.’”<sup>67</sup>

Those “statutorily mandated responsibilities” must be concrete and readily identifiable. As the Supreme Court instructed in *NARUC II* and the D.C. Circuit reiterated in *Comcast*, “the Commission’s ancillary authority ‘is really incidental to, and contingent upon, *specifically*

<sup>62</sup> *National Broadband Plan* at 20.

<sup>63</sup> 47 U.S.C. § 1302(b).

<sup>64</sup> If the Commission is successful with this assertion of authority, the agency could use Section 706 as an essentially unfettered mandate to impose not only new regulations but to pick winners and losers – all without any grant of authority from Congress to intervene in the marketplace in such a comprehensive manner. In fact, this Order has already done so. For example, it decides that these new network management rules will apply to broadband Internet service providers but not to edge providers. See Order, ¶ 50. The Order makes an interesting attempt to justify this line-drawing. It rationalizes, *inter alia*, that because the new regulatory scheme is putatively an outgrowth of the Commission’s *Internet Policy Statement*, which was not aimed at edge providers, the Order’s new mandates should not apply to those entities either. This argument is irrationally selective at best and arbitrary and capricious at worst. If the Commission’s *Internet Policy Statement* was the “template” for the rules, why isn’t the substance of the rules the same as the previous principles? In particular, why does the Order add nondiscrimination to the regulations when that concept was never part of the previous principles?

<sup>65</sup> *Comcast*, 600 F.3d at 654.

<sup>66</sup> *Id.* at 647.

<sup>67</sup> *Id.* at 644 (citing *Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

*delegated powers under the Act.*<sup>68</sup> For the ancillary authority arguments to prevail here, the Order must identify specific subsections within Title II, III or VI that provide the ancillary hook, and then show how the Commission's assertion of power will advance the regulated services directly subject to those particular provisions. Existing court precedent shows that sweeping generalizations are not sufficient.<sup>69</sup> Nor may the general framework of one title of the Act – such as common carriage obligations – be grafted upon services subject to another title that does not include the same obligations.<sup>70</sup> And long descriptions of services delivered via broadband networks do not substitute for hard legal analysis.<sup>71</sup>

Moreover, arguments must be advanced on “a case-by-case basis” for each specific assertion of jurisdiction.<sup>72</sup> *Comcast* explains that the Commission must “independently justify” any action resting on ancillary authority by demonstrating in each and every instance how the action at issue advances the services actually regulated by specific provisions of the Act.<sup>73</sup> The D.C. Circuit apparently was concerned about the Commission's ability to grasp this point, for the

<sup>68</sup> *Id.* at 653 (emphasis in original) (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976) (*NARUC II*)).

<sup>69</sup> *Compare* Order, ¶ 133 (opining that Open Internet rules for wireless services are supported by Title III of the Communications Act pursuant to the Commission's authority “to protect the public interest through spectrum licensing”) with *Comcast*, 600 F.3d at 651 (“each and every assertion of jurisdiction ... must be *independently justified* as reasonably ancillary to the Commission's power”) (emphasis in original).

<sup>70</sup> *See Comcast*, 600 F.3d. at 653 (discussing how the *NARUC II* court “found it ‘difficult to see how any action which the Commission might take concerning *two-way cable* communications could have as its primary impact the furtherance of any *broadcast* purpose.’”) (emphasis added); *id.* at 654 (discussing the *Midwest Video II* court's recognition that the Communications Act bars common carrier regulation of broadcasting and therefore rejecting the imposition of public access obligations on cable because the rules would “relegate[ ] cable systems ... to common-carrier status.”).

<sup>71</sup> The fact that some regulated services may be mixed on the same transmission platform with unregulated traffic does not afford the Commission scope to impose legal obligations on all data streams being distributed via that system. For example, the D.C. Circuit also has rejected other past Commission efforts to extend its ancillary reach over all services offered via a transmission platform merely because the platform provider uses it to provide one type of regulated service along with other services not subject to the same regulatory framework. *See id.* at 653 (citing *NARUC II*, 533 F.2d at 615–16, that overturned a series of Commission orders that preempted state regulation of non-video uses of cable systems, including precursors to modern cable modem service); *NARUC II*, 533 F.2d at 616 (“[T]he point-to-point communications ... involve one computer talking to another....”). The Order appears to be silent on this issue.

<sup>72</sup> *Comcast*, 600 F.3d at 651. As the *Comcast* decision explained, although “the Commission's ancillary authority may allow it to impose some kinds of obligations on cable Internet providers,” it does not follow that the agency may claim “plenary authority over such providers.” *Id.* at 650. To do so, would “run[ ] afoul” of the Supreme Court precedent set forth in *Southwestern Cable* and *Midwest Video I*.<sup>73</sup> *Id.* *See also id.* (“Nothing in *Midwest Video I* even hints that *Southwestern Cable*'s recognition of ancillary authority over one aspect of cable television meant that the Commission had plenary authority over all aspects of cable.”).

<sup>73</sup> *Id.* at 651. It follows that the potential for years of litigation over individual enforcement cases is high, thereby leading to a period of prolonged uncertainty that likely will discourage further investment in broadband infrastructure, contrary to the directives of Sec. 706.

opinion makes it repeatedly.<sup>74</sup> In doing so, the court directed the Commission to more closely study the agency's failures in *NARUC II* and *Midwest Video II* to comprehend the limits of its ancillary reach.<sup>75</sup>

The Order's claim of ancillary jurisdiction is not convincing with respect to Title II because, *inter alia*, it invokes only Section 201 in support of its nondiscrimination mandate.<sup>76</sup> Yet in a glaring omission, Section 201 does not reference nondiscrimination – that concept is under the purview of Section 202, which appears not to be invoked in the Order.<sup>77</sup> (By this

<sup>74</sup> See, e.g., *id.* at 651, 653. For example, the court untangled the Commission's arguments about the implications of language in *Brand X* for the agency's assertion of authority over Internet network management by explaining that:

[n]othing in *Brand X*, however, suggests that the Court was abandoning the fundamental approach to ancillary authority set forth in *Southwestern Cable*, *Midwest Video I*, and *Midwest Video II*. Accordingly, the Commission cannot justify regulating the network management practices of cable Internet providers simply by citing *Brand X*'s recognition that it may have ancillary authority to require such providers to unbundle the components of their services. These are altogether different regulatory requirements. *Brand X* no more dictates the result of this case than *Southwestern Cable* dictated the results of *Midwest Video I*, *NARUC II*, and *Midwest Video II*. The Commission's exercise of ancillary authority over Comcast's network management practices must, *to repeat*, "be independently justified." (emphasis added) (internal citation omitted).

<sup>75</sup> *Id.* at 653–54.

<sup>76</sup> It is curious that in reciting several provisions of Title II as potential bases for ancillary jurisdiction, the Order avoids the most obvious one: Section 202(a), which explicitly authorizes the nondiscrimination mandate imposed on Title II common carriers. This oversight is especially curious given the Order's reliance on the statutory canon of "the specific trumps the general" in revising the agency's interpretation of Section 706. See Order, ¶¶ 117–23 (distinguishing *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24,012 (1998) (*Advanced Services Order*) as limited only to the determination that the general provisions of Section 706 did not control the specific forbearance provisions of Section 10). That canon would seem to apply here as well, given that Section 202(a) certainly is more specific about nondiscrimination than is Section 706. Perhaps reliance on Section 202(a) as a basis for ancillary authority was omitted here in order to avoid reopening divisions over potential Title II reclassification? Of course, any effort to classify broadband Internet access as a common carrier service would confront a different set of serious legal and policy problems, see, e.g., *Cable Modem Declaratory Ruling*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4,798 (2002); *Wireline Broadband Order*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14,853 (2005); *Wireless Broadband Order*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd. 5,901 (2007), but violation of this basic canon of statutory construction would not be among them.

<sup>77</sup> Section 202(a)'s prohibition against "unjust or unreasonable discrimination" carries with it decades of agency and court interpretation which is much different from the Order's "nondiscrimination" mandate. For instance, the Order questions the reasonableness of tiered pricing and paid prioritization. Under the case history of Section 202, tiered pricing and concepts similar to paid prioritization are not presumed to constitute "unjust or unreasonable discrimination." See, e.g., *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984) ("But when there is a neutral, rational basis underlying apparently disparate charges, the rates need not be unlawful. For instance, when charges are grounded in relative use, a single rate can produce a wide variety of charges for a single service, depending on the amount of the service used. Yet there is no discrimination among customers, since each pays equally according to the volume of service used."); *Competitive Telecomm. Ass'n v. FCC*, 998 F.2d 1058, 1064 (continued....)

omission, it appears that the Order may be attempting an end run around the most explicit Title II mandates because of other considerations.) Nor are the arguments successful with respect to the Title III and VI provisions cited in the Order because those statutory mandates address services that are not subject to common carriage-style nondiscrimination obligations absent explicit application of statutory directives.<sup>78</sup>

In addition, the Order's expansive grasp for jurisdictional power here is likely to alarm any reviewing court because the effort appears to have no limiting principle.<sup>79</sup> The D.C. Circuit's warning in *Comcast* against one form of overreaching – the misreading of policy statements as blanket extensions of power – applies here as well:

Not only is this argument flatly inconsistent with *Southwestern Cable*, *Midwest Video I*, *Midwest Video II*, and *NARUC II*, but if accepted it would virtually free the Commission from its congressional tether. As the Court explained in *Midwest Video II*, “without reference to the provisions of the Act” expressly granting regulatory authority, “the Commission’s [ancillary] jurisdiction ... would be unbounded.” Indeed, Commission counsel told us at oral argument that just as the Order seeks to make Comcast’s Internet service more “rapid” and “efficient,” the Commission could someday subject Comcast’s Internet service to pervasive rate regulation to ensure that the company provides the service at “reasonable charges.” *Were we to accept that theory of ancillary authority, we see no reason why the Commission would have to stop there, for we can think of few examples of regulations that apply to Title II common carrier services, Title III broadcast services, or Title VI cable services that the Commission, relying on the broad policies articulated in section 230(b) and section 1, would be unable to impose upon Internet service providers.* If in *Midwest Video I* the Commission “strain[ed] the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts,” and if in *NARUC II* and *Midwest Video II* it exceeded those limits, then here it seeks to shatter them entirely.<sup>80</sup>

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(D.C. Cir. 1993) (“By its nature, § 202(a) is not concerned with the price differentials between qualitatively different services or service packages. In other words, so far as ‘unreasonable discrimination’ is concerned, an apple does not have to be priced the same as an orange.”).

<sup>78</sup> See, e.g., 47 U.S.C. § 153(11); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979) (*Midwest II*) (construing the statute to prohibit treating broadcasters – and, by extension, cable operators – as common carriers). See also *infra* pp. 21-25. With respect to those Title III services that are subject to some common carriage regulation, mobile voice service providers bear obligations pursuant to explicit provisions of Title II of the Act, including but not limited to the provision of automatic voice roaming (Sections 201 and 202); maintenance of privacy of customer information, including call location information explicitly (Section 222); interconnection directly or indirectly with the facilities and equipment of other telecommunications carriers (Section 251); contribution to universal service subsidies (Section 254); and obligation to ensure that service is accessible to and usable by persons with disabilities (Section 255).

<sup>79</sup> For example, in the *Comcast* case, the FCC counsel conceded at oral argument that the ancillary jurisdiction argument there could even encompass rate regulation, if the Commission chose to pursue that path. *Comcast*, 600 F.3d at 655.

<sup>80</sup> *Id.* at 655 (emphasis added).

Some of the Order's most noteworthy flaws are addressed below.

**1. The Order's patchwork citation of Title II provisions does not provide the necessary support for extending common carriage obligations to broadband Internet access providers.**

*Comcast* instructs the Commission that the invocation of any Title II citation as a basis for ancillary jurisdiction must be shown to be "integral to telephone communication."<sup>81</sup> The Order's efforts to meet this legal requirement are thin and unconvincing – and in some instances downright perplexing. For example, it points to Section 201 in arguing that it provides the Commission with "express and expansive authority"<sup>82</sup> to ensure that the "charges [and] practices in connection with"<sup>83</sup> telecommunications services are "just and reasonable".<sup>84</sup> The Order contends that the use of interconnected VoIP services via broadband is becoming a substitute service for traditional telephone service and therefore certain broadband service providers might have an incentive to block VoIP calls originating on competitors' networks. The Order then stretches Section 201's language concerning "charges" and "practices" to try to bolster the claim that it provides a sufficient nexus for ancillary jurisdiction over potential behavior by nonregulated service providers that conceptually would best be characterized as "discrimination."<sup>85</sup> There are at least two obvious weaknesses in this rationale. First, the Order ignores the D.C. Circuit's instruction that the Commission has "expansive authority" only when it is "regulating common carrier services, including landline telephony."<sup>86</sup> Yet broadband Internet access providers are not common carriers and the Order purposely avoids declaring them to be so. Second, the Order seems to pretend that the plain meaning of Section 201's text is synonymous with that of Section 202, which does address "discrimination" but is not directly invoked here.

<sup>81</sup> *Id.* at 657–58 (discussing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 425 (D.C. Cir. 1989) (*NARUC III*)) and noting that "the Commission had emphasized that '[o]ur prior preemption decisions have generally been limited to activities that are closely related to the provision of services and which affect the provision of interstate services.' The term 'services' referred to 'common carrier communication services' within the scope of the Commission's Title II jurisdiction. 'In short,' the Commission explained, 'the interstate telephone network will not function as efficiently as possible without the preemptive detariffing of inside wiring installation and maintenance.' The Commission's pre-emption of state regulation of inside wiring was thus ancillary to its regulation of interstate phone service, precisely the kind of link to express delegated authority that is absent in this case." (quoting *Detariffing the Installation and Maintenance of Inside Wiring*, CC Docket No. 79-105, Memorandum Opinion and Order, 1 FCC Red. 1,190, 1,192, ¶ 17 (1986)).

<sup>82</sup> Order, ¶ 125 (quoting *Comcast*, 600 F.3d at 645).

<sup>83</sup> 47 U.S.C. § 201(b).

<sup>84</sup> *Id.*

<sup>85</sup> The term "discrimination" in the context of communications networks is not a synonym for "anticompetitive behavior." While the word "discriminate" has carried negative connotations, network engineers consider it "network management" – because in the real world the Internet is able to function only if engineers may discriminate among different types of traffic. For example, in order to ensure a consumer can view online video without distortion or interruption, certain bits need to be given priority over other bits, such as individual emails. This type of activity is not necessarily anticompetitive.

<sup>86</sup> *Comcast*, 600 F.3d at 645 (citing to Section 201).



The Order's reliance on Section 251(a)(1) is flawed for similar reasons. That provision imposes a duty on telecommunications carriers "to interconnect directly or indirectly with the facilities of other telecommunications carriers."<sup>87</sup> The Order notes that an increasing number of customers use VoIP services and posits that if a broadband Internet service provider were to block certain calls via VoIP, it would ultimately harm users of the public switched telephone network. All policy aspirations aside, this jurisdictional argument fails as a legal matter. As the Order admits, VoIP services have never been classified as "telecommunications services," *i.e.*, common carriage services, under Title II of the Act.<sup>88</sup> Therefore, as a corollary matter, broadband Internet service providers are not "telecommunications carriers" – or at least the Commission has never declared them to be so. The effect of the Order is to do indirectly what the Commission is reluctant to do explicitly.

**2. The language of Title III and VI provisions cannot be wrenched out of context to impose common carriage obligations on non-common carriage services.**

The Order makes a rather breathtaking attempt to find a basis for ancillary authority to impose nondiscrimination and other common carriage mandates in statutory schemes that since their inception have been distinguished from common carriage. This effort, too, will fail in court, for it flouts Supreme Court precedent on valid exercises of ancillary authority, as reviewed in detail in *Comcast*. If the "derivative nature of ancillary jurisdiction"<sup>89</sup> has any objectively discernible boundaries, it must bar the Commission from taking obligations explicitly set forth in one statutory scheme established in the Act – such as the nondiscrimination mandates of Title II – and grafting them into different statutory schemes set forth in other sections of Act, such as Title III and Title VI, that either directly or indirectly *eschew* such obligations. Here, the Act itself explicitly distinguishes between broadcasting and common carriage.<sup>90</sup> And the Supreme Court long ago drew the line between Title VI video services and Title II-style mandates by forbidding the Commission to "relegate[] cable systems ... to common-carrier status".<sup>91</sup>

The Order's effort to search high and low through provisions of the Communications Act to find hooks for ancillary jurisdiction may be at its most risible in the broadcasting context. The

<sup>87</sup> 47 U.S.C. 251(a)(1).

<sup>88</sup> See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 27 FCC Red. 22,404 ¶¶ 14, 20–22 (2004).

<sup>89</sup> See *Comcast*, 600 F.3d at 654.

<sup>90</sup> 47 U.S.C. § 153(11).

<sup>91</sup> See *Comcast*, 600 F.3d at 654 (citing *Midwest Video II*, 440 U.S. 689, 700–01) (Commission could not "relegate[] cable systems ... to common-carrier status"). Although the *Midwest Video II* case predated congressional enactment of cable regulation, none of the statutory amendments of the Communications Act since that time – the 1984 Cable Act, the Cable Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996 – have imposed any form of Title II-style nondiscrimination mandates on the multichannel video services regulated pursuant to Title VI. To the contrary, the court has recognized that by its nature MVPD service involves a degree of editorial discretion that places it outside the Title II orbit. See, e.g., *Denver Area Educ. Telecomm. Consortium, Inc., v. FCC*, 518 U.S. 727 (1996) (*DAETC*) (upholding § 10(a) of the 1992 Cable Act, which permitted cable operators to restrict indecency on leased access channels).

attempt here seems hardly serious, given that the legal discussion is limited to a one-paragraph discussion that cites to no specific section within Title III.<sup>92</sup> Rather, it stands its ground on the observation that TV and radio broadcasters now distribute content through their own websites – coupled with the hypothetical contention that some possible future “self-interested” act by broadband providers could potentially have a negative effect on the emerging business models that may provide important support for the broadcast of local news and other programming.<sup>93</sup>

This is far from the kind of tight ancillary nexus that the Supreme Court upheld in *Southwestern Cable* and *Midwest Video I*,<sup>94</sup> and it is even more attenuated than the jurisdictional stretch that the Court rejected in *Midwest Video II*.<sup>95</sup> One wonders how far this new theory for an ancillary reach could possibly extend. Many broadcasters for years have benefitted through the sales of tapes and DVDs of their programming marketed through paper catalogs. Does the rationale here mean that the Commission has power to regulate the management of that communications platform, too?

The equally generalized Title III arguments based on “spectrum licensing” apparently are intended to support jurisdiction over the many point-to-point wireless services that are not point-to-multipoint broadcasting. They, too, appear off-point.<sup>96</sup> For example, the Order’s recitation of a long array of Title III provisions (e.g., maintenance of control over radio transmissions in the U.S., imposition of conditions on the use of spectrum) seems misplaced. If this overview is intended to serve as analysis, it contains a logical flaw: Most of the rules adopted today are not being applied – yet – to mobile broadband Internet access service.<sup>97</sup> Certainly the Commission

<sup>92</sup> Order, ¶ 128.

<sup>93</sup> *Id.*

<sup>94</sup> *United States v. Southwestern Cable*, 392 U.S. 157 (1968) (upholding a limit on cable operators’ importation of out-of-market broadcast signals); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*) (plurality opinion upholding FCC rule requiring cable provision of local origination programming); *id.* at 676 (Burger, C.J., concurring) (“Candor requires acknowledgment, for me, at least, that the Commission’s position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts.”). With respect to the local origination programming mandate at issue in *Midwest Video I*, the Commission reportedly “stepped back from its position during the course of the ... litigation” by “suspend[ing] the ... rule and never reinstat[ing] it.” T. BARRON CARTER, JULIET L. DEE & HARVEY L. ZUCKMAN, *MASS COMMUNICATIONS LAW* 522–23 (West Group 2000).

<sup>95</sup> *Midwest Video II*, 440 U.S. at 694–95 (rejecting rules mandating cable provision of public access channels, which the FCC claimed were justified by “longstanding communications regulatory objectives” to “increas[e] outlets for local self-expression and augment[ ] the public’s choice of programs”).

<sup>96</sup> One therefore must wonder whether by this argument the Order seeks to pave the way for future regulation of mobile broadband Internet services. The Order has taken great pains to explain that today’s treatment of mobile broadband Internet access service providers is in consumers’ best interest. History suggests that the Order may merely be postponing the inevitable. In fact, the new rule (Section 8.7) need only be amended by omitting one word: “fixed.” The Commission will be poised to do just that when it reviews the new regulations in two years.

<sup>97</sup> Taking the Order at its apparent word that it is not (yet) applying all new mandates on wireless broadband Internet service providers, it must be that the Order invokes the Commission’s Title III licensing authority to impose the rules on fixed broadband Internet access service providers – that is, cable service providers, common carriers, or both. If so, this is curious on its face because these services are regulated (continued....)

need not depend on the full sweep of Title III authority to impose the “transparency” rule; it need only act in our pending “Truth-in-Billing” docket.<sup>98</sup> Similarly, with regard to the “no blocking” rule, the Order need only rest on the provisions of Title III discussed in the *700 MHz Second Report and Order*, where this rule was originally adopted.<sup>99</sup>

With respect to the asserted Title VI bases for ancillary jurisdiction, the Order actually does point to three specific provisions, but none provides a firm foundation for extending the Commission’s authority to encompass Internet network management. The Order first cites Section 628, which is designed to promote competition among the multichannel video programming distributors (MVPDs) regulated under Title VI, such as cable operators and satellite TV providers. The best-known elements of this provision authorize our program access rules, but the Commission recently has strayed – over my dissent – beyond the plain meaning of the statutory language to read away explicit constraints on our power in this area.<sup>100</sup> Apparently the Commission is about to make a bad habit of doing this.

Of course, Section 628 does not explicitly refer to the Internet, much less the management of its operation. The Congressional framers of the Cable Consumer Protection and Competition Act of 1992, of which Section 628 was a part, were concerned about, and specifically referenced, video services regulated under Title VI.<sup>101</sup> Yet the Order employs a general statutory reference to “unfair methods of competition or unfair or deceptive acts or practices” as a hook for a broad exercise of ancillary jurisdiction over an unregulated network of networks.<sup>102</sup> This time the theory rests largely on the contention that, absent network management regulation, network providers might improperly interfere with the delivery of “over the top” (OTT) video programming that may compete for viewer attention with the platform providers’ own MVPD services.<sup>103</sup> The Order cites to no actual instances of such behavior,

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under Titles VI and II, respectively, and as a legal matter the Commission does not “license” either cable service providers or common carriers.

<sup>98</sup> See *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, Notice of Inquiry, 24 FCC Rcd. 11,380 (rel Aug. 28, 2009) (*Aug. 2009 Truth-in-Billing NOI*).

<sup>99</sup> See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, Report & Order, 22 FCC Rcd 15289 (2007).

<sup>100</sup> See *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, First Report and Order, 25 FCC Rcd. 746 (2010) (*Terrestrial Loophole Order*); *id.* at 822 (McDowell, Comm’r dissenting) (“Section 628 refers to ‘satellite’-delivered programming 36 times throughout the length of the provision, including 14 references in the subsections most at issue here. The plain language of Section 628 bars the FCC from establishing rules governing disputes involving terrestrially delivered programming, whether we like that outcome or not.”). This FCC decision currently is under challenge before the D.C. Circuit. See *Cablevision Systems Corporation v. FCC*, No. 10-1062 (D.C. Cir. filed March 15, 2010).

<sup>101</sup> See 47 U.S.C. § 522(13) (defining “multichannel video programming distributor”). Some of the transmission systems used by such distributors, such as satellites, also are regulated under Title III.

<sup>102</sup> Order, ¶ 130 (citing 47 U.S.C. § 548(b)).

<sup>103</sup> The D.C. Circuit has upheld the Commission’s reliance on Section 628(b) to help drive the provision of competitive Title VI multichannel video programming services into apartment buildings and similar “multi-dwelling unit” developments, see *Nat’l Cable & Telcoms. Ass’n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009), but the policy thrust of that case unquestionably concerned Title VI video services. As the Order

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however, nor does it grapple with the implications of the market forces that are driving MVPDs in the opposite direction – to add Internet connectivity to their multichannel video offerings.<sup>104</sup>

The second Title VI provision upon which the Order stakes a claim for ancillary jurisdiction is Section 616, which regulates the terms of program carriage agreements.<sup>105</sup> The specific text and statutory design of this provision make plain that it addresses independently produced content carried by contract as part of a transmission platform provider's Title VI MVPD service, and not a situation in which there is no privity of contract and the service is Internet access. The Order attempts to make much of Section 616's rather broad definition "video programming vendor" without grappling with the incongruities created when one tries to shove the provision's explicit directives about carriage contract terms into the Internet context.<sup>106</sup> In fact, the application of Section 616 here is only comprehensible if one conceives of it as a new flavor of common carriage, with all the key contract terms supplied by statute.<sup>107</sup> Such a reading,

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acknowledges, it is an open question as to whether OTT video providers might someday be made subject to Title VI, with all of the attendant legal rights and obligations that come with that classification. Order at n. 417. But it is misleading in suggesting that the regulatory classification of OTT video providers has been pending only since 2007. *Id.* On the contrary, it has been pending before the Commission since at least 2004 in the IP Enabled Services docket, WCB Docket 04-36, and the agency has consistently avoided answering the question ever since. While I do not prejudge the outcome of that issue, I question the selective invocation of sections of Title VI here as a basis for ancillary jurisdiction. Such overreaching seems to operate as a way of prolonging our avoidance of an increasingly important, albeit complex, matter.

<sup>104</sup> See, e.g., Letter from William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC, at 1 (Oct. 1, 2010) (DIRECTV Oct. 1 *Ex Parte* Letter) (outlining the wealth of innovative devices currently available in the market, including AppleTV, Boxee, and Roku); Adam Satariano & Andy Fixmer, *ESPN to Web Simulcast, Make Pay TV Online Gatekeeper*, BLOOMBERG, Oct. 15, 2010, at <http://www.bloomberg.com/news/2010-10-15/espn-to-stream-channels-to-time-warner-cable-users-to-combat-web-rivals.html> (explaining ESPN's plan to begin streaming its sports channels online to Time Warner Cable Inc. customers as part of the pay-TV industry's strategy to fend off Internet competitors); Walter S. Mossberg, *Google TV: No Need To Tune In Just Yet*, WALL ST. J., Nov. 18, 2010, at D1 (comparing Google TV technology to its rivals Apple TV and Roku); Louis Trager, *Netflix Plans Rapid World Spread of Streaming Service*, COMM. DAILY, Nov. 19, 2010, at 7 (examining Netflix's plans to offer a streaming-only service in competition with Hulu Plus, as well as its plans for expansion worldwide).

<sup>105</sup> 47 U.S.C. § 536.

<sup>106</sup> For example, Section 616(a)(1) bars cable operators from linking carriage to the acquisition of a financial interest in the independent programmers' channel – a restraint borrowed from antitrust principles that is readily understandable in the context of a traditional cable system with a limited amount of so-called "linear channel" space. The construct does not conform easily to the Internet setting, which is characterized by a considerably more flexible network architecture that allows end users to make the content choices – and which affords them access to literally millions of choices that do not resemble "video programming" as it is defined in Title VI, see 47 U.S.C. § 522(20), including but not limited to simple, text-heavy websites, video shorts and all manner of personalized exchanges of data.

<sup>107</sup> The federal government first involved itself in setting basic rates, terms, and conditions in the context of service agreements between railroads and their customers, but at least one historian (and former FCC commissioner) traced the "'ancient law' of common carriers" back to the development of stage coaches and canal boats. See GLEN O. ROBINSON, "THE FEDERAL COMMUNICATIONS ACT: AN ESSAY ON ORIGINS AND REGULATORY PURPOSE," IN A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, 26 (Max D. Paglin, ed. 1989) (noting that a 19th Century Supreme Court case identified the concept emerging as far back as the reign of William and Mary).

however, would be in considerable conflict with the rationale of *Midwest Video II*,<sup>108</sup> as the D.C. Circuit in *Comcast* already has noted.<sup>109</sup>

In short, the Order's efforts to find a solid grounding for exercising ancillary power here – and thereby imposing sweeping new common carriage-style obligations on an unregulated service – strain credulity. Policy concerns cannot overcome the limits of the agency's current statutory authority. The Commission should heed the closing admonition of *Comcast*:

[N]otwithstanding the “difficult regulatory problem of rapid technological change” posed by the communications industry, “the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer ... Commission authority.” Because the Commission has failed to tie its assertion of ancillary authority over Comcast's Internet service to any “statutorily mandated responsibility,” we ... vacate the Order.<sup>110</sup>

The same fate awaits this new rulemaking decision.

### C. The Order Will Face Serious Constitutional Challenges.

It is reasonable to assume that broadband Internet service providers will challenge the FCC ruling on constitutional grounds as well.<sup>111</sup> Contrary to the Order's thinly supported

<sup>108</sup> In *Midwest Video II*, the Supreme Court invalidated FCC rules that would have required cable operators to provide public access channels. The Court reasoned that, in the absence of explicit statutory authority for such mandates, the public access rules amounted to an indirect effort to impose Title II common carriage obligations – and that, in turn, conflicted with the Title III basis for the agency's ancillary jurisdiction claim. See 440 U.S. at 699-02.

<sup>109</sup> *Comcast*, 600 F.3d at 654.

<sup>110</sup> *Comcast*, 600 F.3d at 661 (internal citations omitted).

<sup>111</sup> The Order incorrectly asserts that the new network management rules raise no serious questions about a Fifth Amendment taking of an Internet transmission platform provider's property. At the outset, the Order too quickly dismisses the possibility that these rules may constitute a *per se* permanent occupation of broadband networks. Under *Loretto v. Teleprompter Manhattan CATV Corp.*, a taking occurs when the government authorizes a “permanent physical occupation” of property “even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the [owner's] use of the rest of his [property].” 458 U.S. 419, 430 (1982). Here, the new regulatory regime effectively authorizes third-party occupation of some portion of a broadband ISP's transmission facilities by constraining the facility owner's ability to decide how to best manage the traffic running over the broadband platform. The new strictures have parallels to the Commission's decision to grant competitive access providers the right to the exclusive use of a portion of local telephone company's central office facilities – an action which the D.C. Circuit held constituted a physical taking. *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

But even assuming *arguendo* that the regulations may not constitute a physical taking, they still trigger serious “regulatory takings” concerns. Today's situation differs from the one at issue in *Cablevision Systems Corp. v. FCC*, where the court held that Cablevision had failed “to show that the regulation had an economic impact that interfered with ‘distinct investment backed expectations.’” 570 F.3d 83, 98–99 (2d Cir. 2009). Here, many obvious investment-backed expectations are at stake: Network operators have raised, borrowed, and spent billions of dollars to build, maintain, and modernize their broadband plant – based at least in part on the expectation that they would recoup their investment over future years under the deregulatory approach to broadband that the Commission first adopted for cable in 2002 and quickly

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assertions, broadband ISPs are speakers for First Amendment purposes -- and therefore challenges on that basis should not be so lightly dismissed. There are several reasons for being concerned about legal infirmities here.

First, the Order is too quick to rely on simplistic service labels of the past in brushing off First Amendment arguments. For example, while it ostensibly avoids classifying broadband providers as Title II common carriers, it still indirectly alludes to old case law concerning the speech rights of common carriers by dismissing broadband ISPs as mere “conduits for speech” undeserving of First Amendment consideration.<sup>112</sup> There is good reason today to call into question well-worn conventional wisdom dating from the era of government-sanctioned monopolies about common carriers’ freedom of speech, particularly in the context of a competitive marketplace.<sup>113</sup> Indeed, at least two sitting Justices have signaled a willingness to wrestle with the implications of the issue of common carriers’ First Amendment protections.<sup>114</sup>

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extended to other types of facilities. Moreover, today’s action could result in significant economic hardships for platform providers even if they have no debt load to pay off. For example, the Order announces the government’s “expectation” that platform providers will build-out additional capacity for Internet access service before or in tandem with expanding capacity to accommodate specialized services. Order, ¶ 114. Although property owners may not be able to expect existing legal requirements regarding their property to remain *entirely* unchanged, today’s vague “expectation” places a notable burden on platform providers – heavy enough, given their legitimate investment-backed expectations since 2002, to amount to a regulatory taking under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

<sup>112</sup> Order, ¶ 144 (citing CWA Reply at 13-14, which cites to *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) and *Time Warner Entertainment, L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996)).

<sup>113</sup> The Supreme Court has never directly addressed the First Amendment issues that would be associated with a government compulsion to serve as a common carrier in a marketplace that offers consumers alternatives to a monopoly provider. This is not surprising, for the courts have had no opportunity to pass on the issue; the FCC in the modern era has found that it served the public interest to waive common carrier status on numerous occasions. See, e.g., *In re Australia-Japan Cable (Guam) Limited*, 15 FCC Rcd. 24,057 (2000) (finding that the public interest would be served by allowing a submarine cable operator to offer services on a non-common carrier basis because AJC Guam was unable to exercise market power in light of ample alternative facilities); *In re Tycom Networks Inc., et al.*, 15 FCC Rcd. 24,078 (2000) (examining the public interest prong of the *NARUC I* test, and determining that TyCom US and TyCom Pacific lacked sufficient market power given the abundant alternative facilities present). In fact, in the more than 85 reported cases in which the FCC has addressed common carrier waivers in the past 30 years, it has only imposed common carriage on an unwilling carrier once – and in that instance the agency later reversed course and granted the requested non-common carrier status upon receiving the required information that the applicant previously omitted. *In re Applications of Martin Marietta Communications Systems, Inc.; For Authority to Construct, Launch and Operate Space Stations in the Domestic Fixed-Satellite Service*, 60 Rad. Reg. 2d (P & F) 779 (1986).

<sup>114</sup> The Order is flatly wrong in asserting that “no court has ever suggested that regulation of common carriage arrangements triggers First Amendment scrutiny.” Order, ¶ 144 (emphasis added). In *Midwest Video II*, the Court stated that the question of whether the imposition of common carriage would violate the First Amendment rights of cable operators was “not frivolous.” 440 U.S. 689 (1979), 709 n.19. In *DAETC*, 518 U.S. 727 (1996), the plurality opinion appeared split on, among other things, the constitutional validity of mandated leased access channels. Justice Kennedy reasoned that mandating common carriage would be “functional[ly] equivalent[t]” to designating a public forum and that both government acts therefore should be subject to the same level of First Amendment scrutiny. *Id.* at 798 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice

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Similarly, the Order offhandedly rejects the analogies drawn to First Amendment precedent concerning cable operators and broadcasters, based only on the unremarkable observation that cable operators and broadcasters exercise a noteworthy degree of editorial control over the content they transmit via their legacy services.<sup>115</sup> In so doing, the Order disregards the fact that at least two federal district courts have concluded that broadband providers, whether they originated as telephone companies or cable companies, have speech rights.<sup>116</sup> Although the Order acknowledges the cases in today's Order, it makes no effort to distinguish or challenge them. Instead, the Order simply "disagree[s] with the reasoning of those decisions."<sup>117</sup>

Second, I question the Order's breezy assertion that broadband ISPs perform no editorial function worthy of constitutional recognition. The Order rests the weight of its argument here on the fact that broadband ISPs voluntarily devote the vast majority of their capacity to uses by independent speakers with very little editorial invention by the platform provider beyond "network management practices designed to protect their Internet services against spam and malicious content."<sup>118</sup> But what are acts such as providing quality of service (QoS) management and content filters if not editorial functions?<sup>119</sup>

And the mere act of opening one's platform to a large multiplicity of independent voices does not divest the platform owner of its First Amendment rights.<sup>120</sup> The Order cites no legal precedent for determining how much "editorial discretion" must be exercised before a speaker can merit First Amendment protection. Newspapers provide other speakers access to their print

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Thomas' analysis went even further in questioning the old [dicta] about common carriers' speech rights. See *id.* at 824–26 (Thomas, J., concurring in the judgment in part and dissenting in part) (stating that "Common carriers are private entities and may, consistent with the First Amendment, exercise editorial discretion in the absence of a specific statutory prohibition").

<sup>115</sup> Order, ¶ 140 (citing, *e.g.*, *Turner Broadcast Systems, Inc. v. FCC*, 512 U.S. 622, 636 (1994) (*Turner I*)).

<sup>116</sup> *Illinois Bell Telephone Co. v. Village of Itasca*, 503 F. Supp. 2d 928 (N.D. Ill. 2007) (analogizing broadband network providers to cable and DBS providers); *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000) (relying on Supreme Court precedent in *Ex parte Jackson*, 96 U.S. 727, 733 (1878) and *Lovell v. Griffin*, 303 U.S. 444, 452 (1938), the court concluded that the message, as well as the messenger, receives constitutional protection because the transmission function provided by broadband services could not be separated from the content of the speech being transmitted).

<sup>117</sup> Order, n. 458.

<sup>118</sup> Order, ¶ 143.

<sup>119</sup> In addition, the Order's citation to a Copyright Act provision, U.S.C. § 230(c)(1), to support the proposition that broadband providers serve no editorial function, see Order, ¶ 142, ignores the fact that broadband ISPs engage in editorial discretion – as permitted under another provision of the Copyright Act, 17 U.S.C. § 230(c)(2) – to block malicious content and to restrict pornography. See *Batzel v. Smith*, 333 F.3d 1018, 1030 n.14 (9th Cir. 2003) (noting that § 230(c)(2) "encourages good Samaritans by protecting service providers and users from liability for claims arising out of the removal of potentially 'objectionable' material from their services.... This provision insulates service providers from claims premised on the taking down of a customer's posting such as breach of contract or unfair business practices.").

<sup>120</sup> Nor does the availability of alternative venues for speech undercut the platform owner's First Amendment rights to be able to effectively use its own regulated platform for the speech it wishes to disseminate. See, *e.g.*, *Nat'l Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994).

“platforms” in the form of classified and display advertising, letters to the editor, and, more recently, reader comments posted in response to online news stories. Advertising historically has filled 60 percent or more of the space in daily newspapers,<sup>121</sup> and publishers rarely turn away ads in these difficult economic times<sup>122</sup> – though they still may exercise some minor degree of “editorial discretion” to screen out “malicious” content deemed inappropriate for family consumption. Under the Order’s rationale, would newspaper publishers therefore be deemed to have relinquished rights to free speech protection?

Third, it is undisputed that broadband ISPs merit First Amendment protection when using their own platforms to provide multichannel video programming services and similar offerings. The Order acknowledges as much but simply asserts that the new regulations will leave broadband ISPs sufficient room to speak in this fashion<sup>123</sup> – unless, of course, hints elsewhere in the document concerning capacity usage come to pass.<sup>124</sup> So while the Order concedes, as it must, that network management regulation could well be subject to heightened First Amendment review, it disregards the most significant hurdle posed by even the intermediate scrutiny standard.<sup>125</sup> The Order devotes all of its sparse discussion to the first prong of the intermediate scrutiny test, the “substantial” government interest,<sup>126</sup> while wholly failing to address the second

<sup>121</sup> See, e.g., McInnis & Associates, “The Basics of Selling Newspaper Advertising,” Newspaper Print and Online ad Sales Training, at [http://www.ads-on-line.com/samples/Your\\_Publication/chapterone2.html](http://www.ads-on-line.com/samples/Your_Publication/chapterone2.html) (visited 12/7/10). This ratio has remained relatively constant for decades. See Robert L. Jones & Roy E. Carter Jr., “Some Procedures for Estimating ‘News Hole’ in Content Analysis,” *The Public Opinion Quarterly*, Vol. 23, No. 3 (Autumn, 1959), pp. 399-403, *pin cite* to p. 400 (noting measurements of non-advertising newsholes as low as 30 percent, with an average around 40 percent) (available at <http://www.jstor.org/stable/2746391?seq=2>) (visited 12/7/10).

<sup>122</sup> Alan Mutter, “Robust ad recovery bypassed newspapers,” *Reflections of a Newsosaur* (Dec. 3, 2010) (available at <http://newsosaur.blogspot.com/>) (visited 12/7/10).

<sup>123</sup> Order, ¶¶ 145-46.

<sup>124</sup> Order, ¶¶ 112-14.

<sup>125</sup> Although the Order addresses only intermediate scrutiny, the potential for application of strict scrutiny should not be disregarded completely. Although the Court in *Turner I* declined to apply strict scrutiny to the statutorily mandated must-carry rules, the network management mandates established by today’s Order may be distinguishable. For example, while rules governing the act of routing data packets might arguably be content neutral regulations, application of the rules in the real world may effectively dictate antecedent speaker-based and content-based choices about which data packets to carry and how best to present the speech that they embody.

<sup>125</sup> *American Library Ass’n v. Reno*, 33 F.3d 78 (D.C. Cir. 1994).

<sup>126</sup> Under First Amendment jurisprudence, it typically is not difficult for the government to convince a court that the agency’s interest is important or substantial. See, e.g., *Carey v. Brown*, 447 U.S. 455, 464–65 (1980) (“even the most legitimate goal may not be advanced in a constitutionally impermissible manner”); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (finding that the state interest was compelling, but the Son of Sam law was not narrowly tailored to advance that objective). But I question whether the Order will survive even this prong of the test because the Commission lacks evidence of a real problem here to be solved. Two examples plus some economic theorizing may be insufficient to demonstrate that the asserted harms to be addressed are, in fact, real and systemic. See *Century Communications Corp. v. FCC*, 835 F.2d 292, 300 (D.C. Cir. 1987) (suggesting that to establish a real harm the Commission has the burden of producing empirical evidence such as studies or surveys). The Commission’s most recent Section 706 Report, which – over the dissent of Commissioner Baker and me – reversed course on 11 years’ worth of consistent findings that advanced services are being (continued....)



and typically most difficult prong for the government to satisfy: demonstrating that the regulatory means chosen does not “burden substantially more speech than is necessary.”<sup>127</sup> And what is the burden here? One need look no further than the Order’s discussion of specialized services to find it. It announces an “expectation” that network providers will limit their use of their own capacity for speech in order to make room for others – an expectation that may rise to the level of effectively requiring the platform provider to pay extra, in the form of capacity build-outs, before exercising its own right to speak.<sup>128</sup> Such a vague expectation creates a chilling effect of the type that courts are well placed to recognize.<sup>129</sup>

Yet the Order makes *no* effort, as First Amendment precedent requires, to weigh this burden against the putative benefit.<sup>130</sup> Instead, Broadband ISP speakers are left in the dark to grope their way through this regulatory fog. Before speaking via their own broadband platforms, they must either: (1) guess and hope that they have left enough capacity for third party speech, or (2) go hat in hand to the government for pre-clearance of their speech plans.

Finally, it should be noted one of the underlying policy rationales for imposing Internet network management regulations effectively turns the First Amendment on its head. The Founders crafted the Bill of Rights, and the First Amendment in particular, to act as a bulwark against state attempts to trample on the rights of individuals. (Given that they had just won a war against government tyranny, they were wary of recreating the very ills that had sparked the Revolution – and which so many new Americans had sacrificed much to overcome.) More than 200 years later, our daily challenges may be different but the constitutional principles remain the same. The First Amendment begins with the phrase “Congress shall make no law” for a reason. Its restraint on government power ensures that we continue to enjoy all of the vigorous discourse, conversation and debate that we, along with the rest of the world, now think of as quintessentially American.

### Conclusion

For the foregoing reasons, I respectfully dissent.

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deployed on a timely basis, is no foundation on which this part of the argument can securely rest. *See supra* Section A.

<sup>127</sup> *Turner I*, 512 U.S. at 662.

<sup>128</sup> *See* Order, ¶ 114 (“We fully expect that broadband providers will increase capacity offered for broadband Internet access service if they expand network capacity to accommodate specialized services. We would be concerned if capacity for broadband Internet access service did not keep pace.”).

<sup>129</sup> *See Fox v. FCC*, 613 F.3d 317 (2d Cir. 2010) (holding that the FCC’s indecency policy “violates the First Amendment because it is unconstitutionally vague, creating a chilling effect”).

<sup>130</sup> *See, e.g.,* Order, ¶¶ 146-48.

**ATTACHMENT A**

Letter of FCC Commissioner Robert M. McDowell to the Hon. Henry A. Waxman, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (May 5, 2010)



Office of Commissioner Robert M. McDowell  
Federal Communications Commission  
Washington, D.C. 20554

May 5, 2010

The Honorable Henry A. Waxman  
Chairman  
Committee on Energy and Commerce  
United States House of Representatives  
Washington, DC 20515

Dear Chairman Waxman:

Thank you for the opportunity to testify before you and your colleagues on the Subcommittee on Communications, Technology and the Internet on March 25 regarding the National Broadband Plan.<sup>1</sup> As I testified at the hearing, the Commission has never classified broadband Internet access services as "telecommunications services" under Title II of the Communications Act. In support of that assertion, I respectfully submit to you the instant summary of the history of the regulatory classification of broadband Internet access services.

In the wake of the privatization of the Internet in 1994, Congress overwhelmingly passed the landmark Telecommunications Act of 1996 (1996 Act) and President Clinton signed it into law. Prior to this time, the Commission had never regulated "information services" or "Internet access services" as common carriage under Title II. Instead, such services were classified as "enhanced services" under Title I. To the extent that regulated common carriers offered their own enhanced services, using their own transmission facilities, the FCC required the underlying, local transmission component to be offered on a common carrier basis.<sup>2</sup> No provider of retail information services was ever required to tariff such service. With the 1996 Act, Congress had the opportunity to reverse the Commission and regulate information services, including Internet access services, as traditional common carriers, but chose not to do so. Instead, Congress codified the Commission's existing classification of "enhanced services" as "information services" under Title I.

<sup>1</sup> *Oversight of the Federal Communications Commission: The National Broadband Plan: Hearing Before the Subcomm. on Communications, Technology, and the Internet of the House Comm. on Energy and Commerce*, 111<sup>th</sup> Cong., 2d Sess. (March 25, 2010).

<sup>2</sup> Some who are advocating that broadband Internet access service should be regulated under Title II cite to the Commission's 1998 *GTEADSL Order* to support their assertion. See *GTE Telephone Operating Cos.*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Red. 22,466 (1998) (*GTEADSL Order*). The *GTEADSL Order*, however, is not on point, because in that order the Commission determined that GTE-ADSL service was an interstate service for the purpose of resolving a tariff question.

Two years after the 1996 Act was signed into law, Congress directed the Commission to report on its interpretation of various parts of the statute, including the definition of "information service."<sup>3</sup> In response, on April 10, 1998, under the Clinton-era leadership of Chairman William Kennard, the Commission issued a *Report to Congress* finding that "Internet access services are appropriately classed as information, rather than telecommunications, services."<sup>4</sup> The Commission reasoned as follows:

The provision of Internet access service ... offers end users *information-service capabilities inextricably intertwined with data transport*. As such, we conclude that it is *appropriately classed as an "information service"*<sup>5</sup>

In reaching this conclusion, the Commission reasoned that treating Internet access services as telecommunications services would lead to "negative policy consequences."<sup>6</sup>

To be clear, the FCC consistently held that any provider of information services could do so pursuant to Title I.<sup>7</sup> No distinction was made in the way that retail providers of Internet access service offered that information service to the public. The only distinction of note was under the Commission's *Computer Inquiry* rules, which required common carriers that were also providing information services to offer the transmission component of the information service as a separate, tariffed telecommunications service. But again, this requirement had no effect on the classification of retail Internet access service as an information service.

In the meantime, during the waning days of the Clinton Administration in 2000, the Commission initiated a Notice of Inquiry (NOI) to examine formalizing the regulatory classification of cable modem services as information services.<sup>8</sup> As a result of the *Cable Modem NOI*, on March 14, 2002, the Commission issued a declaratory ruling

<sup>3</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2521-2522, § 623.

<sup>4</sup> *Federal-State Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Red. 11501, K 73 (1998) (*Report to Congress*).

<sup>5</sup> *Id.* at 180 (emphasis added).

<sup>6</sup> *Id.* at Tj 82 ("Our findings in this regard are reinforced by the negative policy consequences of a conclusion that Internet access services should be classed as 'telecommunications.'").

<sup>7</sup> As Seth P. Waxman, former Solicitor General under President Clinton, wrote in an April 28, 2010 letter to the Commission, "[t]he Commission has *never* classified any form of broadband Internet access as a Title II 'telecommunications service' in whole or in part, and it has classified all forms of that retail service as integrated 'information services' subject only to a light-touch regulatory approach under Title I. These statutory determinations are one reason why the Clinton Administration rejected proposals to impose 'open access' obligations on cable companies when they began providing broadband Internet access in the late 1990s, even though they then held a commanding share of the market. The Internet has thrived under this approach." (Emphasis in the original.)

<sup>8</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry, 15 FCC Red 19287 (2000) (*Cable Modem NOI*).

classifying cable modem service as an information service.<sup>9</sup> In the Commission's *Cable Modem Declaratory Ruling*, it pointed out that "[t]o date ... the Commission has declined to determine a regulatory classification for, or to regulate, cable modem service on an industry-wide basis."<sup>10</sup> Only one month earlier, on February 14, 2002, in its Notice of Proposed Rulemaking<sup>11</sup> regarding the classification of broadband Internet access services provided over wireline facilities, the Commission underscored its view that information services integrated with telecommunications services cannot simultaneously be deemed to contain a telecommunications service, even though the combined offering has telecommunications components.

On June 27, 2005, the Supreme Court upheld the Commission's determination that cable modem services should be classified as information services.<sup>12</sup> The Court, in upholding the Commission's *Cable Modem Order*, explained the Commission's historical regulatory treatment of "enhanced" or "information" services:

By contrast to basic service, the Commission decided not to subject providers of enhanced service, *even enhanced service offered via transmission wires*, to Title II common-carrier regulation. The Commission explained that it was unwise to subject enhanced service to common-carrier regulation given the "fast-moving, competitive market" in which they were offered.<sup>13</sup>

Subsequent to the Supreme Court upholding the Commission's classification of cable modem service as an information service in its *Brand X* decision, the Commission *without dissent* issued a series of orders classifying all broadband services as information services: wireline (2005)<sup>14</sup>, powerline (2006)<sup>15</sup> and wireless (2007).<sup>16</sup> Consistent with

<sup>9</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Red 4798 (2002) (*Cable Modem Declaratory Ruling*), *aff'd*, *Nat'l. Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*).

<sup>10</sup> *Id.* at H 2.

<sup>11</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Red 3019 (2002) (*Wireline Broadband NPRM*).

<sup>12</sup> *Brand X*, 545 U.S. 967.

<sup>13</sup> *Id.* at 977 (emphasis added, internal citations to the Commission's *Computer Inquiry II* decision omitted).

<sup>14</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings; Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era*, CC Docket Nos. 02-33, 95-20, 98-10, 01-337, WC Docket Nos. 04-242,

the Court's characterization, the Commission made these classifications to catch up to market developments, to treat similar services alike and to provide certainty to those entities provisioning broadband services, or contemplating doing so. Prior to these rulings, however, such services were never classified as telecommunications services under Title II.

Again, I thank you for providing the opportunity to testify before your Committee and to provide this analysis regarding the regulatory classification of broadband Internet access services. I look forward to working with you and your colleagues as we continue to find ways to encourage broadband deployment and adoption throughout our nation.

Sincerely,



Robert M. McDowell

cc: The Honorable Joe Barton  
The Honorable Rick Boucher The  
Honorable Cliff Steams

05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Red 14853 (2005) (*Wireline Broadband Order*), *aff'd*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

<sup>13</sup> *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Red 13281 (2006).

<sup>16</sup> *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Red 5901 (2007).

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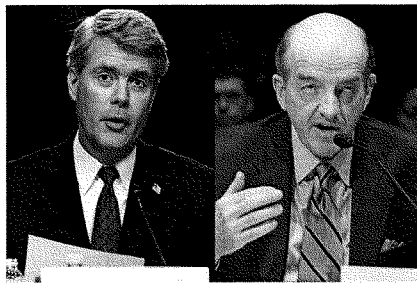
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TECH

## Net Neutrality, For and Against

Two former FCC commissioners—one Democrat, one Republican—weigh in



Robert McDowell, left, served on the Federal Communications Commission as a Republican from 2006 to 2013, while Democrat Michael Copps was a commissioner from 2001 to 2011. PHOTO: WIN MCNAMEE/GETTY IMAGES; MIKE THEILER/BLOOMBERG NEWS

Updated Dec. 14, 2017 6:58 a.m. ET

The Federal Communications Commission set Thursday to repeal the rules requiring internet providers to treat all traffic on the web equally. The agency is also expected to remove the internet's classification as a utility, freeing cable and telecom operators from many regulations.

Those moves to roll back net neutrality have fired up the concept's supporters and critics. Net neutrality supporters warn that the repeal means the death of the web as we know it, while critics say the changes will promote investment. To clear things up, we invited two former FCC commissioners to discuss the issue over email.

Michael Copps, who supports net neutrality rules, was a Democratic FCC commissioner from 2001 to 2011. Robert McDowell, who served as a Republican commissioner from 2006 to 2013, thinks the rules should be eliminated. Edited excerpts from their responses follow.

**WSJ:** Net neutrality means a lot of different things to a lot of people. Should people be worried, or is it hype?

**Copps:** Net neutrality simply means your internet service provider treats you like everyone else—no favors and no faster services, thank you, for those who pay more or for affiliates and friends of the big telecom guys. Take it away and the gatekeepers take over. A dynamic internet responds to the people who rely on it, not monopoly-seekers at the center. You bet people should be worried. It's not hype.

**McDowell:** It's hype. Some advocates for more Internet regulation have done a terrific job of scaring people with apocalyptic predictions. The term “net neutrality” has no legal definition and can mean whatever you want it to. But if we're talking about what used to be known as the “permissionless” Internet with maximum freedom and openness for consumers and entrepreneurs throughout the Net's ecosphere, then we should look to the legal framework that gave us the bountiful and freedom-enhancing Internet we have today. That “light touch” framework was the product of bipartisan consensus during the Clinton-Gore administration; but in 2015, the Obama-led FCC departed from that and created uncertainty and confusion when it declared that an antiquated 1934 law designed for the old Ma Bell monopoly (when phones were held in two hands) should apply to the Net for the first time. On Thursday, the FCC is restoring the state of the law as it was before the 2015 change. Consumers were well-protected then by three powerful federal laws: the Federal Trade Commission Act, the Sherman Act and the Clayton Act, plus other laws too. They will be well-protected again after Thursday's FCC vote.

**WSJ:** Is broadband service a utility, like electricity or the telephone, that should be regulated? Or is it a competitive market that doesn't need the same rules?

**Copps:** The internet is the internet and defining it in either-or terms misses the mark. As our major communications platform, it is heavily imbued with the public interest, so there has to be a measure of public interest oversight. But it must be competitive, too. Allowing it to become the province of a few giant providers, like the current FCC is poised to do, is anything but pro-competitive.

**McDowell:** The broadband market is competitive and FCC studies have concluded just that. Consumers of broadband services are “cutting the cord” and are going mobile. The marketplace has given them abundant choices. For example, nearly nine out of 10 Americans have access to four mobile broadband providers. Prices are falling sharply and speeds are getting faster. Unlimited data plans are now the norm. And on “Cyber Monday,” almost half of all online retail orders were placed through a mobile device. All of this adds up to a market that is highly competitive.



**WSJ:** Much of the debate has been between “big content” like Netflix or YouTube and “big distributors” like Comcast and AT&T. But AT&T is trying to buy HBO and YouTube owner Google now sells internet service. So how do those blurred lines change the discussion?

**Copps:** These companies are becoming more and more alike, combining both distribution and content. Controlling both is my definition of monopoly. Our regulatory and legislative branches need to catch up with that, not to mention our jurisprudence. Big Content and Big Distribution will fight it out, buy each other out or do whatever they deem necessary to serve their bottom lines. The role of public-interest oversight is not to mediate special-interest jousts, but to protect consumers, better understood as citizens.

**McDowell:** Industry analysts call the trends you describe “convergence.” All of the companies you named are evolving to meet consumer demand. They are all “technology” companies. They’ve built thousands of miles of fiber that connects to routers and servers all over the country, to convey a massive slurry of ones and zeros that comprise digital communications like voice, video and apps. So yes, the lines of yesteryear drawn to define these companies are blurring. The laws that impose these obsolete distinctions are out of date and need modernizing.

**WSJ:** If the current rules go away, what does the Internet look like in five years for the average consumer?

**Copps:** It would look like, and be, a gatekeeper’s paradise. Online competition and mind-bending innovation would be little more than memories of a better past. Very importantly, our civic dialogue—the news and information upon which a successful self-governing society depends upon—would be further eroded. Telecom and media consolidation have wreaked havoc with investigative journalism and turned political campaigns into a crass reality show and our “news” into bottom-feeding infotainment. I don’t believe democracy can survive on such thin gruel. Throw in that we, the people, will be paying ever-more exorbitant prices for this constricted future and you will understand why so many millions of people all across the land have contacted the FCC and Congress telling them to preserve our current net-neutrality rules.

**McDowell:** Five years from now, the restoration of the Clinton-era rules will have produced more abundance in the entire Internet ecosphere, more consumer choices, lower prices per bit per second and innovations we can’t even imagine today. The Internet will remain robust, vibrant, open and freedom-enhancing. Predictions of the Net’s demise will be proven wrong and they will be long forgotten. Do you remember all the folks who bought Amish butter churns before Y2K? The world didn’t end then *either*.



Congressman Greg Walden  
2185 Rayburn House Office Building  
Washington, D.C. 20515

March 11, 2019

Re: Response to Written Testimony of Mr. Matthew Wood

Congressman Walden;

I am writing you in response to the written testimony of Mr. Matthew Wood, Vice President of Policy and General Counsel for the Free Press Action Fund submitted to the House Energy and Commerce Committee's Subcommittee on Communication and Technology, dated March 12, 2019.

In response to Mr. Wood's first bullet on Page 25 of his written testimony: This FTTH deployment was limited in scope due to lack of available cash, ultimately only resulting in us building to about 700 homes in Hermiston. The loan we secured to do the build was obtained prior to the Open Internet Order and had to be guaranteed by Umatilla Electric Cooperative. Sadly, the project scope that we had hoped for was significantly limited due to a lack of capital.

In response to Mr. Wood's second bullet on Page 25 of his written testimony, we obtained the cable systems at zero dollars through RFP's from Boardman, Irrigon, Umatilla and unincorporated areas of NW Umatilla County, as they had been abandoned by their previous owner. We originally activated them with DOCSIS 2.0 Cable Modem Termination Systems (CMTS) bought on eBay. They allowed us to provide download speeds up to 30 Mbps. We upgraded the systems to DOCSIS 3.0 systems in 2016 using Huawei Distributed CMTS's using cash organically generated. This new, and extraordinarily cost-effective upgrade now allows us to offer speeds exceeding 100 Mbps to the home.

Mr. Wood's assertions are simply put, ill-informed and unfortunately tell a story far different (and not accurately) from the one that actually occurred here in Eastern Oregon. Had Mr. Wood simply picked up the phone or emailed, I would have helped him so that his testimony could be a complete representation of the facts.

I hope this helps bring clarity to the situation.



Respectfully,

A handwritten signature in black ink, appearing to read "Joseph Franell", written in a cursive style.

Joseph Franell  
CEO



February 8, 2019

The Honorable Peter Welch  
U.S. House of Representatives  
Committee on Energy and Commerce, and  
Subcommittee on Communications & Technology  
2187 Rayburn House Office Building  
Washington, DC 20515

**VIA EMAIL & FAX**

Dear Peter,

I read with great interest the testimony of Joseph Franell, Chief Executive Officer of Eastern Oregon Telecom, who testified before the Subcommittee's hearing yesterday on "Preserving an Open Internet for Consumers, Small Business, and Free Speech." Mr. Franell is also Chairman of Oregon's Broadband Advisory Council, and as a fellow CEO of a rural broadband provider, I have long admired Oregon's leadership in rural broadband policies. In fact, an early pioneer in Oregon's efforts to build out its vastly rural state was Stanford University's Professor Edwin B. Parker, who had retired to rural Oregon in the 1990's. Vermont Telephone (or VTel) brought Professor Parker to Vermont, to meet with state regulators to talk about how to unleash telecom infrastructure deployment in our own rural areas. Regrettably, our regulators disagreed, and in my view, Vermont has paid the price ever since.

My purpose here is to respectfully support Mr. Franell's comments. And, I want to add that VTel is another example of a rural broadband provider that is increasing network investment. We are presently upgrading to Ericsson 4G LTE roaming software and laying the groundwork from there to upgrade to 5G. These are multi-million dollar software and hardware upgrades. Although we are in the midst of final testing for these very material and costly upgrades, for completion in February, the initial results have been strong, and we are discussing roaming arrangements with some of America's larger carriers.

*What I want to underline here is the very direct connection between these investments and the light regulatory touch that the current Federal Communications Commission (FCC) instituted starting in 2017.* For us, this is not theoretical; it's actually happening. Major capital investments -- for carriers large and small, rural and urban -- almost always require a first step of "belief" and "confidence" that they will be able to realize a return on that investment. We would not have made the decision to invest millions of dollars on Ericsson 4G/5G upgrades in the

absence of the commitment by the FCC, under Chairman Pai, evidenced by his Internet Freedom and other deregulatory policies, to the economic revival of rural broadband providers.

With that said, I hope you will permit me to add two anecdotal paragraphs that should further clarify *why* we support the FCC's efforts in this area.

1. When Google's self-driving cars become widely used in Vermont over the coming decade, even Vermont's most outspoken Internet Freedom advocates – as you know, there are many candidates for this title in Vermont – likely won't want emergency wireless collision warnings for their self-driving cars to compete with the Netflix HD movie transmitting to their car's TV screens. Precisely the opposite: they will *insist* that safety-related data take priority over entertainment content. I enjoyed Mr. Frenell's comments that he dares almost not speak about such things in rural Oregon, because Internet Freedom has been so politicized. And I, too, have been lambasted in Vermont for mentioning such views. But open and candid debate, and consideration of both sides of any topic, is what you and I both deeply believe in. Your example in Vermont, over the years, has inspired my confidence that such open debate is still possible in 2019.
2. The overarching goal of an open Internet is important and inspiring. As you know, I have long advocated for more federal policies that support GigE fiber Internet to every rural home, akin to what we have built to every rural home in the 14 rural Vermont villages we serve with fiber. But we must also recognize that wired and wireless technologies present different challenges, from an operator's standpoint, and thus require regulators and legislators to recognize the same, especially with 5G on the horizon. Mobile broadband providers are, collectively, being asked to spend hundreds of billions of dollars, while at the same time content providers at the edge of the network (such as Netflix, Amazon and Hulu) insist that they be relinquished from any responsibility in sharing the costs associated with streaming massive amounts of content, on an hourly basis. They say: "Hey VTel, collect those costs from your customers!" I respectfully submit that Vermonters wouldn't mind if VTel first asked the big tech companies to chip in. Yet "Net Neutrality" advocates insist we should be precluded from doing so. How is that in the interest of Vermonters? We know it isn't.

In closing, please know that, at VTel and VTel Wireless, we consider Chairman Pai's Internet Freedom policies to be *pro-consumer and pro-investment*, enabling our company to invest with more confidence, in the expectation we can serve our rural Vermont customers better, at lower costs. Thank you for considering these views, and may I ask that this be made part of the record from yesterday's hearing.

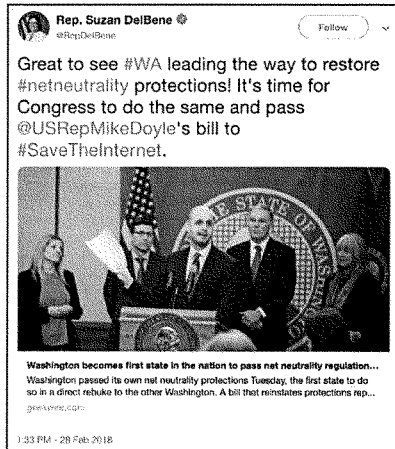
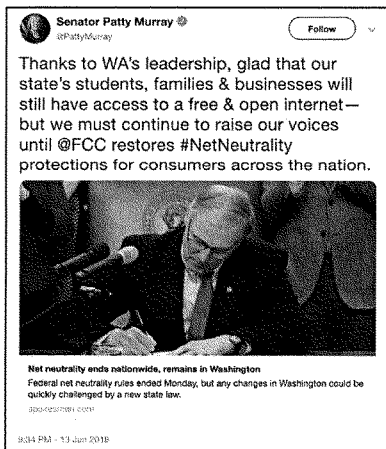
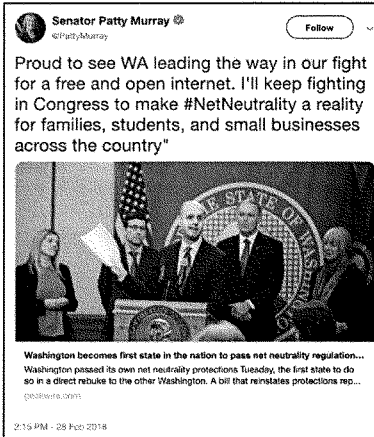
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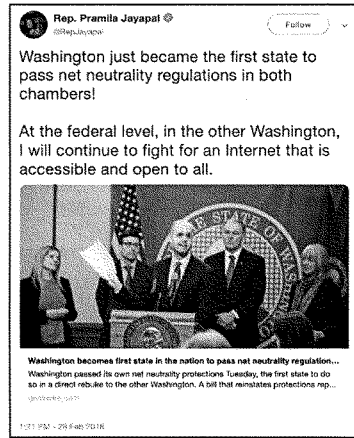


Dr. J. Michel Guité  
Chairman

cc: The Honorable Frank Pallone, Jr.  
U.S. House of Representatives  
Chairman  
Committee on Energy and Commerce

The Honorable Greg Walden  
U.S. House of Representatives  
Ranking Member  
Committee on Energy and Commerce





#### **Former FCC Commissioner Mignon Clyburn**

"...Washington state's new net neutrality law underscores what we all know: that a substantial majority of the public is in favour of net neutrality protections. [I commend Governor Inslee and the Washington state legislature for listening to their constituents and ensuring that the citizens of Washington continue to experience a free and open internet.](#)"

"Net neutrality preserved by Washington State law," [BBC News](#), March 6, 2018



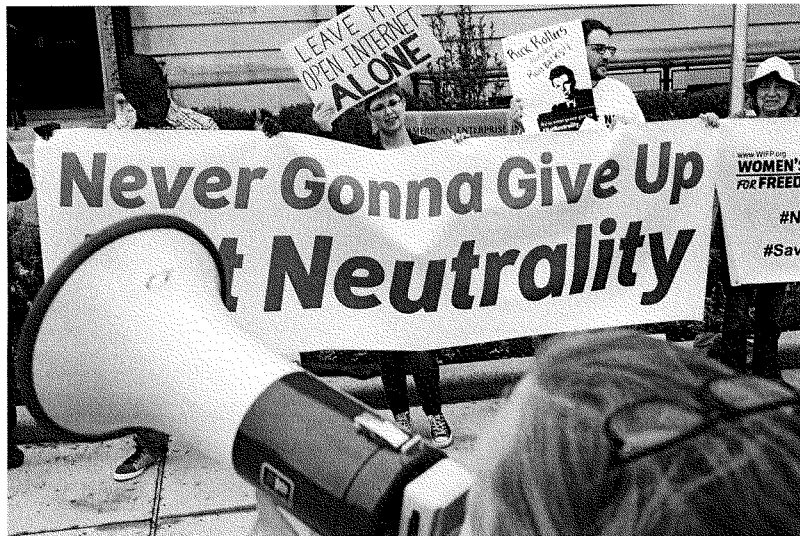
3/12/2019

Restore net neutrality? Congress has an opportunity [Editorial] - HoustonChronicle.com

## OPINION // EDITORIALS

## Restore net neutrality? Congress has an opportunity [Editorial]

March 11, 2019 | Updated: March 11, 2019 6:35 p.m.



Proponents of net neutrality protest against Federal Communication Commission Chairman Ajit Pai outside the American Enterprise Institute before his arrival May 5, 2017 in Washington, DC. Appointed to the commission by President Barack Obama in 2012, Pai was elevated to the chairmanship of the FCC by U.S. President Donald Trump in January.

Photo: Chip Somodevilla, Staff / Getty Images

Congress has another chance to address the issue of net neutrality, and this time we urge lawmakers to get the issue of internet regulation right, despite deep partisan divisions in Washington.

The House Subcommittee on Communications and Technology, which includes Texas representatives Pete Olson, R-Sugar Land, and Marc Veasey, D-Fort Worth, has a hearing scheduled for Tuesday on the "Save the Internet Act of 2019" unveiled last week. We ask those two representatives to put consumers ahead of corporate interests.

3/12/2019

Restore net neutrality? Congress has an opportunity [Editorial] - HoustonChronicle.com

As we've written before, internet service providers should treat everyone equally, from the largest online company to the smallest user. Early internet pioneers embraced this principle widely, and it's one worth preserving still. It's the reason why in 2015 the FCC decided to issue new rules requiring broadband providers not play favorites among companies vying to use the information superhighway. And it's why the FCC, acting under new leadership appointed by President Trump, was wrong to so quickly reverse course.

Without rules protecting net neutrality, companies who control access to the basic infrastructure of the internet, including Comcast, Texas-based AT&T, and other firms, could essentially turn the digital freeway into a toll road. No broadband firms should be able to speed one company's ramp onto internet and slow another's, or prevent one kind of content from reaching its audience but not another's. We've already seen this happen. In 2011, MetroPCS announced plans to only allow streaming video from YouTube over its 4G network and block all competitors. AT&T, Sprint and Verizon spent years blocking Google Wallet from being used over their networks because the service competed with one they had developed.

Telecoms shouldn't have the right to pick and choose the winners and losers over their networks. In the 21st century, internet access has become another must-have utility like electricity or gas and should be regulated like one, especially since it touches nearly every aspect of modern-day life.

But once Trump appointed a new FCC chairman in 2017, it rolled back rules subjecting broadband providers to a vastly streamlined version of the regulation familiar to utilities. The bill introduced last week in the House would restore those consumer protections.

The bill, which also has support in the Senate, codifies net neutrality rules such as no blocking or throttling into law. . It also would also put broadband providers under the jurisdiction of Title II of the Communications Act, which provides the legal basis to regulate those companies and ensure the internet superhighway remains a freeway for all legal content. .

The bill's a good start, and Republicans should embrace it. But Democrats, too, will have to remain open to compromise, as a one-sided bill will go nowhere. And that's a dead-end we can't afford.

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HEARST *netneutrality*

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## A(nother) chance for Congress net neutrality

BY EV EHRlich, OPINION CONTRIBUTOR — 02/27/19 10:00 AM EST  
THE VIEWS EXPRESSED BY CONTRIBUTORS ARE THEIR OWN AND NOT THE VIEW OF THE HILL

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The death of bipartisanship in Washington is much lamented these days, but those weeping loudest are usually those who destroyed it. Its funeral will be attended by its assailants. Members of the "Gang" that produced a workable compromise on immigration walked away from their own deal. Senators who traded support for the tax bill for bipartisan fixes to health care were jilted by their Leadership. Is there any hope our leaders can cooperate to get things done, as voters demand?

Of course there is, and one low-hanging opportunity is net neutrality rules to protect competition and the free flow of traffic on the internet, an area where public fury is rising along with calls for the Congress to act.

For over a decade, partisans have clashed over "net neutrality" rules to prevent internet providers from blocking access to websites or restricting competition by giving some content access to a members only "fast lane." When the Courts questioned the FCC's ability to implement such a rule in 2015, the agency lurched to the left with a program to graft 1930s era telephone monopoly regulation onto the internet in order justify implementing neutrality rules, opening the door to "Mother-May-I" government control over new services, prices, and innovation online.

In response, as soon as they got in the door, President Trump's FCC veered even further to the right, tossing out the idea of internet regulation altogether in 2017, as if the public had no stake in this essential feature of modern life.

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But just like in other likely areas for bipartisanship – whether immigration, climate, health care, infrastructure, or whatever else – the public is way ahead of their feuding representatives. Over three quarters of the public support clear, responsible regulation in this area. They want to see us make “no blocking, no throttling, no anticompetitive prioritization” the law of the land, forever, full stop, and that requires a clean neutrality bill. Doing so would give liberals the core protections they’ve sought since Henry Waxman and Democratic FCC Chair Julius Genachowski pushed similar neutrality proposals back in 2010. And it would allow the Republicans in Congress to show voters they can get things done and enact sensible regulations on their own.

Only two groups would potentially oppose such an effort. Unsurprisingly, they’re the far right and the far left.

Every time you tell business there’s something they can’t do, the far right starts to twitch. But on the issue of net neutrality, they twitch alone – even CEOs who would be affected by such a law agree the certainty and predictability of legislation is better for their businesses than the endless, see-sawing chaos we have now. And many hope it would be a springboard towards broader, national set of privacy and online safety rules, or such pro-competition measures as safe harbor reform – which makes companies more responsible for what happens on their networks – or even break-up of the tech monopolies, so that cornering one market – be it search or social networking – does not give a company the ability to corner another.

The far left will also complain – particularly the ideologues demanding Ma bell style Title II regulation of the Internet who want to make the Internet a public utility under government control, or even ownership. But that’s considered extreme not just by both houses of Congress, but by Democrats as well. Many on the left, including labor and civil rights leaders, are skeptical that rules designed for the Depression era phone network will help close the digital divide, let alone usher in a world of driverless cars and mobile supercomputers. Imagine if investment in the Internet was another part of an infrastructure bill stalled on the Senate floor! It’s hard to imagine how government would do anything but destroy the track record of the competitively built and managed broadband network – that has brought faster, more reliable, and more innovative service to the consumer every year.

Yes, we need to revive bipartisanship, and cleaning up Internet policy is a great place to start. Let’s have less hand-wringing and more rolling up sleeves and move a new, bipartisan telecoms bill. It can be done.

*Ev Ehrlich is a former undersecretary of commerce and principal at ESC Consulting Inc.*

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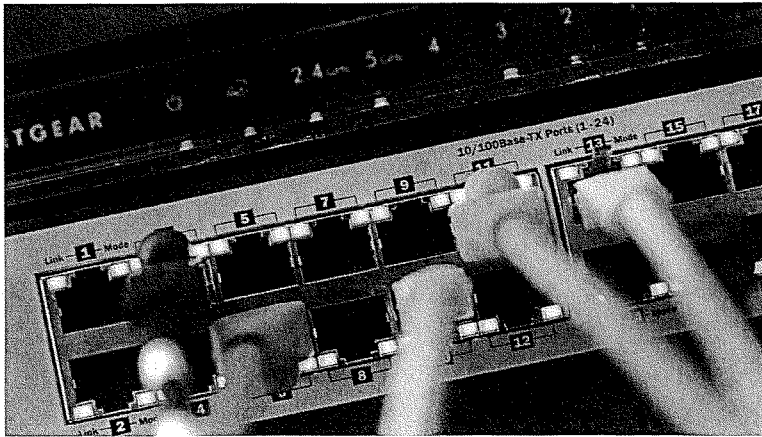
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3/11/2019

The Democrats' net neutrality bill is political virtue signaling at its worst - Los Angeles Times

## The Democrats' net neutrality bill is political virtue signaling at its worst

By JON HEALEY  
MAR 06, 2019 | 9:30 AM



3/11/2019

The Democrats' net neutrality bill is political virtue signaling at its worst - Los Angeles Times

House Democrats introduced a bill Wednesday to restore the strict net neutrality rules the Federal Communications Commission adopted in 2015, governing how internet service providers handled traffic flowing over routers and switches like the one displayed in East Derry, N.H. (Charles Krupa / Associated Press)

Congressional Democrats launched their latest effort Wednesday to preserve the free and open nature of the internet, unveiling bills in the House and Senate to reinstate the utility-style regulation the Federal Communications Commission adopted in 2015 before abandoning it two years later.

This is not a serious piece of legislation. Instead, it's the political equivalent of virtue signaling — a display of support by Democrats for the strongest possible net neutrality rules. And it has no chance of becoming law.

Democrats should know that by now, Republicans may support the idea of net neutrality, but they won't support neutrality rules that treat internet access services like the phone monopolies of yore. And that's what the 2015 FCC rules did.

I get the legal argument for why the FCC, led by Democratic Chairman Tom Wheeler, went that route. Under the current version of the federal Communications Act, the FCC can't bar internet service providers from doing such evil deeds as blocking or throttling legal websites and services unless it classifies broadband internet access as a "telecommunications service," making it eligible for the strict rules once applied to phone monopolies.

And yes, I know that many communities have only one or two broadband ISPs today, and I get the argument that connecting to the internet is a lot like picking up the phone to make a call — the user decides where to go online, and all the ISP does is deliver the traffic, unaltered.

Enter the Fray: First takes on the news of the minute »

But here's the thing. If Democrats are going to legislate, why settle for restoring the 2015 rules that Republicans oppose? Why not try to forge consensus on a whole new section of the Communications Act that authorizes and instructs the FCC to preserve net neutrality?

The FCC's authority to regulate is the key sticking point here, and it has been for years.

Before the latest GOP-controlled FCC renounced the whole idea of net neutrality rules last year, the commission had been trying to safeguard the status quo online for well more than a decade, under both Republican and Democratic chairmen. But before 2015, every time they adopted rules or took action against ISPs that violated net neutrality, the courts rebuked them for overstepping their authority.

The 2015 rules sought to solve that problem by reclassifying ISPs as telecommunications services, giving the FCC all the authority it needed to enforce net neutrality rules. But the reclassification also gave the agency the authority to enforce rules dating back to the 1930s that had nothing to do with net neutrality — for example, the rules governing the prices ISPs charged for services.

It was a square-peg, round-hole approach, and it proved to be the rules' political undoing. Major phone and cable companies asserted that this regulatory overhang would discourage investors and reduce spending on broadband networks, and Republicans sided with them. And once Republicans retook control of the FCC in 2017 under Chairman Ajit Pai, they not only repealed the 2015 rules, they declared that the FCC had no authority to regulate almost anything ISPs did.

The fight over net neutrality will continue to go back and forth like this until Congress writes new, internet-specific provisions into the Communications Act instead of relying on outdated rules written for previous generations of communications technology. Republicans might not be crazy about that idea, but there's a solid free-market reason to regulate until there is vibrant competition among internet service providers throughout the country. As things stand, ISPs have the incentive and the opportunity to favor selected sites and services online for a fee.

Republicans have, in fact, put forward bills to write net neutrality rules into law — but without giving the FCC the power to adopt new rules should circumstances online demand them. There's a middle ground here that authorizes the FCC to write and enforce a limited set of net neutrality rules, and it's time for lawmakers to find it.

3/11/2019

The Democrats' net neutrality bill is political virtue signaling at its worst - Los Angeles Times

The X factor is the Court of Appeals for the District of Columbia Circuit, which is considering a lawsuit against the FCC's decision to repeal the 2015 rules. If the lawsuit prevails, Republicans will be much more interested in a legislative fix — and Democrats will have no reason to support one. If the court upholds the FCC, the roles will be reversed. For that reason, the best time to seek a compromise may be now, while there's still doubt about what the court will do.

Unfortunately, that's not what Democrats are proposing. Maybe they're counting on enough Republicans in the Senate to join them in supporting the 2015 rules, as three did last year. But that's not enough to get a majority in the Senate this year, and it's certainly not enough to override a certain veto by President Trump.

Jon Healey

Jon Healey is the deputy editorial page editor, which means he's one of the individuals editing (and sometimes writing) byline-free screeds that, technically speaking, reflect the views of the publisher. He writes most often about healthcare policy, intellectual property, technology and the economy. Previously, he's written about tech, government and music for several news outlets, most of which still exist.

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March 5, 2019

The Honorable Frank Pallone, Jr.  
Chairman  
House Committee on Energy & Commerce  
2125 Rayburn House Office Building  
Washington, DC 20515

The Honorable Greg Walden  
Ranking Member  
House Committee on Energy and Commerce  
2322 Rayburn House Office Building  
Washington, DC 20515

The Honorable Mike Doyle  
Chairman  
House Committee on Energy and Commerce  
Subcommittee on Communications and Technology  
2367 Rayburn House Office Building  
Washington, DC 20515

The Honorable Robert E. Latta  
Ranking Member  
House Committee on Energy and Commerce  
Subcommittee on Communications and Technology  
2467 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Pallone, Ranking Member Walden, Chairman Doyle, Ranking Member Latta, and Members of the Committee:

On behalf of ALLvanza, a nonpartisan, forward-thinking, policy and action nonprofit organization that advocates for the success of Latinxs, and other underserved communities, in our Internet- and technology-based society, we respectfully submit this letter in support of a free and open Internet. We believe that in order to facilitate an Internet ecosystem that fosters innovation and fair and equal economic opportunity, a free and open Internet is crucial. With that in mind, lawmakers must come together in a bipartisan way to enact modern, smart policies that evolve with the ever-changing Internet environment. The solution should be newly developed and not a reliance on



outdated regulatory policy such as Title II, which has become politically charged and continuing to pursue it as a viable solution would likely be a waste of effort. Furthermore, the current pattern of major net neutrality policy changes happening every time there is an administration, and/or change in congress' composition, could prove quite detrimental to a safe and stable environment that is good for consumers as well as investment and innovation.

We focus on ensuring an open Internet because the stakes couldn't be higher. Affordable, reliable broadband access is the engine that drives underserved communities' (and all communities') achievement and success in the modern Internet- and technology-driven world. ALLvanza advocates for this essential, fundamental right, and associated smart policies, for the benefit of all people living in the United States. We specifically advocate for an online environment that is free from blocking, throttling, and other practices, both active and passive, which hinder Internet freedom. ALLvanza strongly supports an open Internet that is able to grow and expand at the speed of innovation.

Below is a list of key principles that ALLvanza advocates for/against that provide a foundation for a free and open Internet:

**Transparency:** Transparency is crucial to an equitable, open Internet for all stakeholders and therefore fair, comprehensive transparency standards must be established for both fixed and mobile broadband providers. These standards should ensure that providers disclose and make public their terms and conditions, network management policies and performance metrics across their footprint. All consumers have a right to know this information about the services upon which they spend their hard earned money.

**No Redlining:** Redlining is a discriminatory practice that perpetuates and amplifies the Digital Divide and therefore it must be expressly prohibited. Furthermore, fixed and mobile providers must be required to develop and deploy infrastructure in a way that serves everyone living in the United States equally, regardless of race, socioeconomic status or location, and not just to those able to afford premium services. ALLvanza encourages policy makers to analyze and address the many ways that redlining can present itself in infrastructure deployment and how to create and pass smart policies to prevent redlining from taking place.

**No Blocking or Throttling:** Regulators should restrict fixed and mobile broadband providers from blocking and/or throttling competitors', or anyone's, devices, content, applications, or services as long as they are lawful.

**No Discrimination:** Fixed and mobile broadband providers should be explicitly prohibited from discriminating against lawful network traffic in the same way that discrimination is not allowed in other public spaces.

These principles are all key parts of ensuring a free and open Internet that fosters innovation and growth and keeps the U.S. at the forefront of the global economy. At this critical time in our history, ALLvanza urges policy makers to work together in a bipartisan way to enact policies that are in the best interest of everyone living in the U.S. Both sides of the aisle must come to a consensus on how to address net neutrality, once and for all, in a way that benefits and protects consumers while allowing the Internet to continue to flourish. If each administration change initiates a complete reversal of 4-8

years of net neutrality policies it can create uncertainty and harm consumers, investment, and the economy.

ALLvanza stands ready to work with and advise policy makers on how to enact smart policies that address key net neutrality issues and collaborate on how to address future issues we have yet to face.

Sincerely,



Rosa Mendoza  
President & CEO

**ALLvanza**

cc: All members of the House Committee on Energy and Commerce



**Our Internet ecosystem is ready for a comprehensive, pro-consumer, pro-innovation permanent legislative solution for net neutrality**

By Rosa Mendoza, President & CEO, ALLvanza

One of the beauties of our nation is our freedom; freedom to speak, to learn, to work, to earn. Each of those freedoms relies heavily on the Internet, and I would further posit a free and open Internet. In order to have the freedom to speak, lawful Internet content must not be blocked or throttled in any way. In order to learn, broadband providers must be transparent about the way their networks operate and the methodology behind deployments so that everyone in the U.S. has equal access to necessary resources. Furthermore, transparency in deployment, hiring, and network operation metrics, among other examples, ensure that companies are not able to engage in redlining or other discriminatory practices. To be able to work and earn equally, the Internet must be free and open to all stakeholders and users and not only tailored to those with enough money for pay for priority.


Unfortunately, the net neutrality debate has become embroiled in partisanship, not allowing policy makers to work together and come up with a permanent bipartisan, pro-consumer solution that protects consumers while at the same time creating a favorable environment for investment and broadband deployment. However, at a recent Energy and Commerce Subcommittee Hearing regarding a review of statements in favor of a legislative solution for net neutrality, several members of Congress expressed a willingness to work across the aisle. Furthermore, based on statements made, it seemed that multiple members, democrats and republicans, agree more than disagree on key components of a legislative net neutrality solution. This is encouraging to hear since we know that the only way that everyone will benefit is with a bipartisan solution.

Given this possible desire within Congress for consensus and what is at stake, it is crucial that policy makers work together in a bipartisan way to enact modern, smart policies that evolve with the ever-changing Internet environment and that fully protect consumers and keep the Internet ecosystem free of negative activities that hinder our Internet freedom. The current pattern of major net neutrality policy changes that happen every time there is an administration, and/or change in congress' composition, can be detrimental to a safe and stable environment that is good for consumers as well as investment.

Advocating for an open Internet a big part of ALLvanza's mission. We advocate for modern, smart, strongly pro-consumer and pro-innovation policies to be enacted and take decisive action to work with policy makers to help guide the conversation to ensure our country's most vulnerable communities are able to safely and reliably participate and take full advantage of online resources. Policies must be modern and smart because of the

ever-evolving nature of the Internet ecosystem. Our connected world has changed so much in the past few years, and does so virtually on a daily basis, and we must continue to think critically and analytically about how the laws we pass, or don't pass, will impact vulnerable communities such as Latinx, veteran and women, among others.

Our Internet ecosystem is ready for a comprehensive, pro-consumer, pro-innovation permanent legislative solution for net neutrality. ALLvanza urges Congress to work together in a bipartisan way to reach this solution for the good of all Internet users living in the U.S. The solution should be bipartisan, newly developed and not a reliance on outdated regulatory policy such as Title II, which has become politically charged and continuing to pursue it as a viable solution would likely be a waste of effort. ALLvanza hopes to be a part of these discussions to be the advocate of underserved communities and is ready to work with and advise policy makers, members of the FCC, and others on how to enact smart policies that address key net neutrality issues and collaborate on how to address future issues we have yet to face.

 Press Release, Statement March 6, 2019

## CTIA Statement on Open Internet.

WASHINGTON D.C. - Please attribute the following statement to CTIA\*  
President and CEO, Meredith Attwell Baker.

"CTIA and our members support an Open Internet. We need permanent bipartisan rules to protect Americans online, while maintaining the opportunity for innovation that allowed the Internet to flourish. Today's announcement unfortunately does not get us closer to a permanent solution to end the debate and protect consumers."

### About CTIA




CTIA\* ([www.ctia.org](http://www.ctia.org)) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21<sup>st</sup> century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best

3/11/2019

CTIA - CTIA Statement on Open Internet

*practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.*

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Press Release

## **Statement of NCTA – The Internet & Television Association Regarding the “Save the Internet Act of 2019”**

March, 06, 2019

“We are disappointed that Democratic leaders would ignore growing calls for bipartisan action, and instead advance a highly controversial, partisan proposal that puts the internet under heavy-handed government control.

Despite significant interest in Congress, our industry, and across America in pursuing legislation that would codify core net neutrality rules and promote internet growth, this latest approach forcing Title II regulation back on the internet offers no such hope. The internet does not need saving. To the contrary, it is thriving, with wireless companies investing in advanced 5G networks and our industry advancing our 10G platform to deliver speeds 10 times faster than what is available today. We remain committed to finding a real bipartisan solution that offers consumers stable and enforceable protections, without the unnecessary overreach of common carrier regulation, so that this exceptional network progress can continue.”

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## Congress: Net Neutrality Rules Should Look Forward, Not Back

USTelecom | The Broadband Association [Follow](#)

Mar 6 · 2 min read

By Jonathan Spalter

First things first. USTelecom's members—large and small—are committed to maintaining our open internet and delivering consumers and businesses the content and services they demand.

Unfortunately, the *Save the Internet Act* takes our open and thriving internet backward—not forward—and would have negative implications for America's competitiveness in the global digital economy.

Our view: it is important that lawmakers—now on both sides of the aisle—continue working on legislation to make net neutrality the law of the land. It is time for Congress to finally provide the certainty that will eliminate the confounding regulatory 'rinse-and-repeat cycle' that is bad for consumers, investment, and innovation.

Rather than 'saving the internet,' the legislation introduced today would lead only to more uncertainty. Members of Congress considering such a drastic change in internet policy should understand what has *not* happened since the FCC's 2017 order restoring the modern, pro-consumer framework that fueled internet policy through 20 years of astronomical growth.

The internet as we know it is still very much open, thriving and growing. The dire predictions that internet service providers were poised to engage in throttling, blocking and anti-competitive prioritization have simply... not happened.



**Rather than 'saving the internet' the legislation introduced today would lead only to more uncertainty.**

. . .

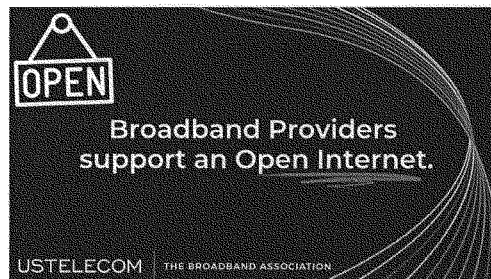
So what *has* happened since the FCC's policy change?

Increased investment has produced significant benefits for consumers as carriers have plowed more resources into improving both deployment and speed.

Because of a perceived regulatory gap, some states have moved to implement open internet laws and executive orders. A 50-state patchwork threatens service for customers, will hamper innovation and dampen investment in local communities.

None of this activity—in the states or the courts—is helpful to consumers or businesses. With no end in sight, a legislative solution that provides a permanent, enforceable, national open internet framework is essential to resolving this issue once and for all.

While net neutrality has become a divisive and partisan issue, the rhetoric hides a simple truth: there is broad agreement among providers and policymakers that we must protect an open internet and prohibit certain anti-consumer activities. This is where the debate should focus.



USTelecom members are proud of their contribution and commitment to America's communications networks and the millions of customers they support. We are determined to work with Congress to maintain our dynamic and open internet to optimize investment, encourage pro-consumer innovation, sustain our digital leadership, and truly save the internet for generations to come.

*Jonathan Spalter is president and CEO of USTelecom—The Broadband Association.*

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3/11/2019

Rick Boucher on Twitter: "As chair of Comms Subcommittee in 2010 I urged passage of strong #netneutrality principles. Guarantees agai..."



**Rick Boucher**  
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As chair of Comms Subcommittee in 2010 I urged passage of strong #netneutrality principles. Guarantees against blocking, throttling, paid prioritization=keys to #openinternet. But #TitleII is totally unnecessary & will impede investment, the foundation for future internet growth.

8:26 AM - 6 Mar 2019

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**Josh Finestone** @Josh\_Finestone · Mar 6

Replying to @rickboucherdc

I agree!



**Pelosi, Schumer Unveil Democratic Net Neutrality Bill (1)**

By Jon Reid

Posted March 6, 2019, 12:00 PM Updated March 6, 2019, 1:55 PM

- Bill would restore Obama-era internet rules requiring ISPs to treat network traffic equally
- House Energy and Commerce Committee to advance measure in next few months

Democratic lawmakers are moving a bill to restore Obama-era net neutrality rules, amid Republican skepticism.

The three-page measure would reinstate rules eliminated by the GOP-controlled Federal Communications Commission that barred internet service providers such as AT&T Inc. and Comcast Corp. from blocking or slowing data traffic on their networks in most circumstances. But it's unclear how much GOP support the Democrats will garner for their bill.

"Democrats are honoring the will of the people and restoring the protections that do this: stop unjust, discriminatory practices by ISPs that try to throttle the public's browsing speed, block your internet access, and increase your cost," House Speaker Nancy Pelosi (D-Calif.) said at a Capitol press conference alongside Senate Minority Leader Charles E. Schumer (D-N.Y.) and other Democrats.

The House Energy and Commerce Committee will mark up the legislation in the next few months, Chairman Frank Pallone (D-N.J.) told reporters. The panel's Communications and Technology Subcommittee is planning a March 12 hearing.

"We're going to guarantee in the Energy and Commerce Committee that we move quickly on this legislation to save the internet because of its importance," Pallone said.

Rep. Greg Walden (R-Ore.), the ranking member of the Energy and Commerce panel, and fellow Republican members Bob Latta (R-Ohio) and Cathy McMorris Rodgers (R-Wash.), called on Democrats to work with them on legislation.

"Instead of looking to the extremes, and discarding twenty years of bipartisan consensus, we can come together on shared principles to address blocking, throttling, and paid prioritization," the three GOP lawmakers, who have introduced three separate net neutrality bills, said in a statement.

An FCC spokeswoman cautioned against over-regulation.

"The Internet in America today is free and vibrant, and the main thing it needs to be saved from is heavy-handed regulation from the 1930s," Tina Pelkey, a spokeswoman for FCC Chairman Ajit Pai, said in a statement.

NCTA - The Internet & Television Association, the leading cable industry trade group, criticized the Democratic bill, by Rep. Mike Doyle (D-Pa.), saying it would impose utility-style regulations on broadband providers.

"We are disappointed that Democratic leaders would ignore growing calls for bipartisan action, and instead advance a highly controversial, partisan proposal that puts the internet under heavy-handed government control," the group said in a statement.

Public interest groups praised the Democrats' bill, The Save The Internet Act, as a step to protect consumers from the interests of telecom giants, while slamming Republican net neutrality bills as weak on consumer protection.

"None of the three bills House Republicans introduced in February would safeguard Net Neutrality or other online rights," Matt Wood, vice president of policy at tech policy group Free Press Action, said in a statement. "The Save The Internet Act is the only choice for any member of Congress wishing to protect the open internet and do right by their constituents."

The net neutrality bill is Democrats' latest attempt to restore the Obama-era rules, a move which so far has garnered only tepid Republican support.

Three Republican senators joined with all Senate Democrats in 2018 to approve a resolution that would have rescinded the FCC's December 2017 repeal of the Obama-era rules, but it wasn't taken up by the then GOP-controlled House.

"Now we have a Democratic House, and Republicans will have a second chance to right the Trump administration's wrong," Schumer said.

Tech companies, public interest groups, and state attorneys general are challenging the FCC's rules rollback in the U.S. Court of Appeals for the District of Columbia Circuit.

(Updated with additional reporting and statements from Democratic lawmakers )

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To contact the editor responsible for this story: Keith Perine at [kperine@bloomberglaw.com](mailto:kperine@bloomberglaw.com)

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Politico Pro Article

**Subject:** E&C's top Republican sets sights on tech industry liability shield

By John Hendel

03/07/2019 09:03 PM EDT

House Energy and Commerce ranking member Greg Walden (R-Ore.) said lawmakers should pair renewed attention on net neutrality with re-examining the tech industry's prized shield from liability for content hosted online.

The tech industry has long fought to preserve its liability protections, enshrined in Section 230 of 1996's Communications Decency Act, though last year saw the passage of an exemption for content facilitating sex trafficking. Now, Walden told POLITICO, "it may be time to take a look at" making broader changes — and tying them into talks regarding prospective net neutrality legislation.

Walden drew an analogy between the liability shield and net neutrality, the tech industry-favored principle of telecom companies treating all traffic equally. He maintained tech companies, in pushing to retain liability protections, behave like the content-neutral data carriers they want broadband companies to be, yet don't want to face the same tightly regulated "common carrier" framework they support for those same internet providers.


"It seems kind of peculiar to argue on the one hand you get Section 230 protection because you're a common carrier, but on the other hand, call for net neutrality legislation on everybody but yourself," Walden said.

Democrats may not cater to GOP desires, however. Telecom subcommittee chairman Mike Doyle (D-Pa.) told POLITICO Tuesday's net neutrality legislative hearing will center on just Democrats' Save the Internet Act, which would simply revive Obama-era rules rooted in the common-carrier framework.

Democrats think they can pass the measure in the House "by the end of April," Doyle predicted.

To view online:

<https://subscriber.politicopro.com/tech/whiteboard/2019/03/e-cs-top-republican-sets-sights-on-tech-industry-liability-shield-2829316>

 The Washington Post

Democrats want to 'save the Internet.' They'll need Republicans' help. — The Washington Post

The Post's View Opinion

## Democrats want to 'save the Internet.' They'll need Republicans' help.

By Editorial Board  
March 8

DEMOCRATS IN Congress say they want to "save the Internet" with a net neutrality law. But they will need Republicans' help to do it. The bills introduced in the House and Senate this week, unfortunately, are unlikely to inspire any cooperation.

Guaranteeing that paying Americans can access any legal content they want without interference is better for consumers and better for Internet start-ups that want to build on the backbone that service providers have put into place. The question has always been what authority the Federal Communications Commission has to regulate those providers, and the best way to answer that question has always been for Congress to step in. In this context, it's good that legislators are acting. The problem is that Democrats want to rely on the same solutions that have caused the current impasse.

When the Obama-era FCC moved in 2015 to reclassify broadband providers as common carriers under Title II of the Communications Act, it did so because it had been told that their previous classification as information services put them beyond regulators' reach. But there's a reason using Title II was not the FCC's initial inclination: It subjected broadband companies to strictures designed for old-school telephone firms, including a mandate that they allow open access to their wiring infrastructure as well as the possibility of government-set rates. Industry protested, and the current FCC under Chairman Ajit Pai repealed the rules with nothing to replace them.

Congress has an opportunity now to replace those rules with something more nuanced, but the bills introduced this week miss the mark. Instead, they bring back Title II. Democratic bills would make permanent limitations on rate-setting and other regulatory practices that have alarmed providers, but the classification is still toxic — and outdated.

Lawmakers would do better to focus on the three bright-line prohibitions on which most parties have come to agree. Those are bans on blocking websites and services, as well as slowing them down or speeding them up to favor a company's own content or in exchange for payment. Any rules should otherwise allow providers to manage congestion on their networks as long as they make those management practices transparent to consumers. Congress should also give the FCC meaningful enforcement authority against harmful and anti-competitive practices along with the ability to write future rules to enforce net neutrality. Lawmakers could call this whatever title number they please — as long as it's not II.

Net neutrality was officially repealed last summer, and the Internet is not dead yet. But the dramatic harms to investment that opponents predicted when the Obama-era rules went into place did not materialize then, either — except for smaller service providers, whose trouble stemmed from the same Title II flaws Congress could avoid today. Whether the Internet really needs “saving,” there’s room for legislators on both sides of the aisle to protect it. It’s time to start trying.

**Read more:**

The Post’s View: Everyone is suing everyone over net neutrality. Congress should step in.

David Von Drehle: From net neutrality to digital privacy, Congress does diddly

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## Congress can finally get it right Pass the Save the Internet Act

BY ED BLACK, OPINION CONTRIBUTOR — 03/12/19 08:10 AM EDT  
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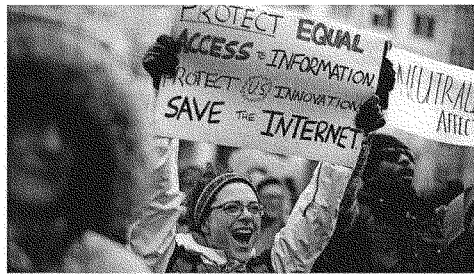
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The FCC abdicated its duty to protect consumers' access to communications when it reversed the 2015 Open Internet rules. Congress now has a chance to use its oversight and legislative powers over the agency to step up and defend consumers and the benefits of an open Internet. The House Communications and Technology Subcommittee begins by holding a hearing Tuesday on legislation introduced by House and Senate leaders last week that would restore net neutrality rules.

The Save the Internet Act would reinstate the 2015 Open Internet rules that a federal appeals court upheld in 2016. The internet has been historically neutral and this legislation clarifies and reinstates the rules: no blocking, no throttling and no paid prioritization – and empower the FCC to prohibit unjust, unreasonable and discriminatory practices.

In December 2017, the FCC under Chairman Ajit Pai, formally reversed its Open Internet rules and said the FCC would no longer enforce net neutrality.

This term also gets overused, and has taken on different meanings, but it means that an Internet service provider (ISP) has to treat all traffic moving across its network the same – that it can't arbitrarily decide, on its own, to block, to throttle, or to charge more for prioritizing the content that you want to see. The term net neutrality was coined in 2003 by an academic to encapsulate what had been an important concept for successful networks even going back to railroads – that of nondiscrimination from carriers.

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My association has been fighting for open networks, open markets, and open competition for almost five decades. Open networks allow information to flow freely and more people to be connected, which helps innovation and ultimately economic growth. The best example of that is the Internet, which has created incredible economic activity but also facilitated free speech, education and social mobility.

The Internet has thrived under the de facto principles of net neutrality, and the FCC has tried many ways over the years to insure that the Internet remains an open network, especially as dominant ISPs have signaled their desire to discriminate to maximize their profit and power. In the early days of the commercial Internet, Internet access service was provided primarily over telephone lines. The FCC regulated this service under its rules for telephone service, which prevented carriers from "mak[ing] any unjust or unreasonable discrimination."

Although the FCC decided in 2002 to treat broadband Internet access over cable lines differently, the chairman at the time, Michael Powell, who currently leads the National Cable & Telecommunications Association, still felt it necessary for the FCC to protect "Four Internet Freedoms".

In 2005, the FCC under Powell took action against Madison River Communications for blocking Voice over IP (VoIP), and in 2008 the FCC voted to uphold a complaint against Comcast for blocking peer-to-peer networking applications. In 2010 and then again in 2015, the FCC tried different ways to enshrine net neutrality rules.

In addition to Pai's reversal of the open internet rules, the FCC, which Congress created to oversee communications networks, has now failed to make any attempt whatsoever to prevent the abusive behaviors of blocking, throttling, and paid prioritization. The only thing on the books now is a vague "transparency" rule that just requires that broadband providers post on their website or just send the FCC information about how they manage their networks.

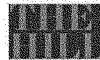
Now, Congress has an opportunity to act, and correct this mistake by passing the Save the Internet Act, which will undo what Pai has done. This is the right move, and both chambers of Congress should act quickly to pass it.

*Ed Black is president and CEO of the Computer & Communications Industry Association.*

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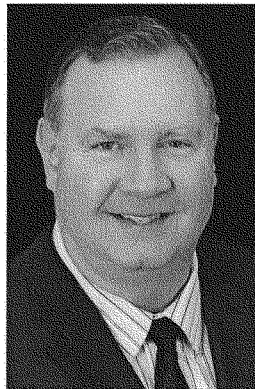
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## **Ffranell | A permanent solution to net neutrality for rural Oregon**

2 hrs ago



Joseph Franell

Across our country, approximately 23 million Americans living in rural areas lack sufficient access to the internet. Many of these people are our friends and neighbors right here in Eastern Oregon, who are not connected to the single most important driver of economic growth, job creation, and a better quality of life.

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Bridging this digital-divide in Oregon is a top priority of mine as an internet service provider (ISP). This is something that I highlighted during a hearing before the Energy and Commerce Committee in Washington, D.C., last month, when Representative Greg Walden invited me to testify about the importance of a free and open internet for rural broadband expansion. As Congress continues to debate the future of the internet this week, I'd like to share my perspective as a small ISP working to bridge the digital divide in Eastern Oregon.

For underserved communities in our part of the state, small ISPs like Eastern Oregon Telecom (EOT) are on the front lines of connecting rural areas with high-speed broadband. Unfortunately, as ISPs much larger than mine and giant internet companies like Netflix and YouTube were arguing over the terms of their traffic focused primarily on our country's largest cities, the Obama Administration came down on the side of the Silicon Valley companies. The end result was the unelected former chairman of the Federal Communications Commission (FCC) instituting heavy-handed, one-size-fits-all regulations that hurt small ISPs, including EOT. This in turn hurt our ability to expand broadband to underserved communities.

Case in point is the 2015 net neutrality rule that regulated internet service under Title II of the Communications Act, which was originally used to govern monopoly telephone companies in the 1930s. While Title II sounds innocuous, this rule gave big government unlimited authority to micromanage every single aspect of a provider's business, including rate fixing, taxing the internet, and even censoring content.

For EOT and other small ISPs, there is nothing neutral about this kind of authority. Net neutrality shifted EOT's focus from our customers to regulatory interference and the draining cost of reporting and compliance. Every dollar we spend reporting to regulatory agencies is a dollar that is not available to invest in new infrastructure to serve rural Eastern Oregon.

Since the repeal of net neutrality, we have been able to focus on providing exceptional service and expanding into other underserved markets. And while the relief from the heavy hand of net neutrality is welcome, the prospect of a new administration reinstating Title II regulations over the internet is not.

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The uncertainty of net neutrality rules ping-ponging between Republican and Democrat administrations needs to end. That's where Congress comes in.

Fortunately, as I learned while testifying before Congress, Republicans and Democrats actually agree on the key parameters of a free and open internet. A permanent, bipartisan legislative solution to net neutrality is the best path forward. There are three bills that have been introduced by Republicans on the House Energy and Commerce committee that will accomplish that goal.

Representative Walden introduced legislation that codifies into law permanent prohibitions on blocking, throttling, and paid prioritization for internet traffic, and requires that ISPs be transparent in their network management practices and prices. This legislation reaffirms longstanding, bipartisan agreements on net neutrality protections.

Representative Bob Latta, from Ohio, introduced a bill that includes important net neutrality protections without reclassifying broadband into the Title II framework that is overly burdensome and can harm investment in broadband expansion that we have seen in Oregon. This legislation is drawn directly from a bill that the last Democratic chairman of the House Energy and Commerce Committee proposed in 2010.

And Representative Cathy McMorris-Rodgers, from Washington State, has introduced legislation that mirrors a state law from our neighbor to the north that also prohibits blocking, throttling, and paid prioritization. This bill was passed by a Democratic legislature in Washington and signed into law by a Democratic governor.

All these proposals provide permanent net neutrality solutions that will protect consumers, innovation, and an open internet. This is something only Congress can do, but we need bipartisan support to do it the right way.

I am encouraged that there is broad agreement on permanent net neutrality protections that can be solidified into law through legislation. And I'm encouraged that Representative Walden is committed to capitalize on this opportunity for real bipartisan action.

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In doing so, Congress can make sure that the internet continues to flourish under a light touch regulatory regime while providing certainty to the ISPs like EOT. That will help us expand broadband access and bridge the digital divide in Eastern Oregon and across rural America.

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*Joseph Franell is the CEO of Eastern Oregon Telecom, based in Hermiston.*

# Multichannel NEWS

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## Updated: Netflix Gets Hammered Over 'Throttling'

But Free Press says Netflix is free to deliver video any way it likes

EGGERTON JOHN · MAR 25, 2016

With Netflix apparently having discriminated in its delivery of Internet video to wireless carriers AT&T and Verizon, after those carriers had been accused of doing the video degrading, there was plenty of input from industry players.

The pushback was particularly strong given Netflix's push for net neutrality rules that prevent ISPs from discriminating and require them to tell customers how they are managing their networks.

There have long been rumblings, sometimes not so quietly in the case of Comcast, alleging Netflix intentionally congested traffic to wired ISPs in peering disputes. Netflix has denied it.

The reaction started with AT&T not long after Netflix's conduct was reported in *The Wall Street Journal*, but that reaction did not include FCC Chairman Tom Wheeler, who declined to comment. The FCC has been investigating ISP zero rating plans, which critics say is a form of discrimination by favoring one form of content over another.

AT&T top D.C. executive James Cicconi was not reticent: "We're outraged to learn that Netflix is apparently throttling video for their AT&T customers without their knowledge or consent," he said in a statement.

A former top FCC official conceded Netflix's conduct may not be under the FCC's purview, but suggested that did not get it off the hook.

"When Netflix pointed the finger at ATT & Verizon it had three fingers pointing back at itself," said Adonis Hoffman, chairman of Business in the Public Interest and former chief of staff to FCC commissioner Mignon Clyburn. "Throttling traffic without notifying the customer is a violation of the principles of net neutrality 101, and they failed. Even though edge providers are technically not covered, transparency is a best practice."

Randolph May of free market think tank Free State Foundation had plenty to say.

"There are many different reasons to be concerned about the discovery that Netflix has been engaged over a period of years in throttling the speed of its videos accessed Verizon and AT&T wireless subscribers," May said. "First is just Netflix's complete lack of transparency about the practice, especially in light of its strident advocacy against treating Internet communications differentially. Netflix's hypocrisy in this regard is pretty stunning, if perhaps not surprising."

The FCC has rules that require ISP transparency about how they handle their broadband traffic, but the FCC has consistently said edge provider conduct is beyond its reach.

"Second is the light Netflix's actions shed on the FCC's faulty approach to 'Open Internet' regulation. The FCC only concerns itself with practices of the ISPs, not the so-called edge providers, and this leads to a double standard. I'm not in favor of most of the FCC's newly-adopted Internet regulation (except reasonable disclosure requirements), and I don't really want to see Netflix's practices regulated by the FCC either. But by acting in the way it does, the FCC lends itself to becoming part and parcel of Netflix's hypocrisy."

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Updated: Netflix Gets Hammered Over 'Throttling' - Multichannel

"Third, you can bet you will see this double-standard — and the hypocrisy — recur, sooner or later, in the realm of privacy regulation, where the FCC wants to adopt a regime that will facilitate differential privacy regulation for Internet market participants."

Berin Szoka of TechFreedom was equally as unhappy and, like May, saw it as symptomatic of something larger.

"Yesterday, Netflix admitted the company has long been throttling its traffic for AT&T and Verizon customers without their knowledge or consent," he said. "Two years ago, Netflix led the fight to get the FCC to require transparency about precisely such practices, and to ban throttling as inherently harmful. It also claimed that Comcast was effectively throttling Netflix traffic simply by failing to offer unlimited, free interconnection to Netflix — something companies like Netflix have always had to pay for. With the help of comedian John Oliver, Netflix rallied an angry mob that ultimately succeeded in getting President Obama to tell the FCC to dramatically expand 'net neutrality' to include interconnection — saying that throttling should be defined 'from a consumer's perspective,' regardless of who was doing it or how it worked."

"It turns out Netflix was really saying 'Net neutrality for thee, but not for me,'" continued Szoka. "The only question is whether Netflix was throttling user traffic at the time, or if it only decided to do so later. To be clear, there's nothing inherently wrong with Netflix's throttling, 'Throttling' video speeds may sound scary, but it can benefit consumers for the very reasons Netflix cites today. So why didn't Netflix just disclose the practice? Was Netflix afraid the angry mob it helped create would turn on it? And where was its talk of 'striking a balance that ensures a good streaming experience' when it was lobbying the FCC to ban throttling outright?"

"Make no mistake, the importance of this revelation for U.S. Internet policy goes well beyond Netflix and the all-too-common practice of corporate hypocrisy in Washington," said Fred Campbell, director of Tech Knowledge. "Policymakers in the U.S. have systematically excluded Netflix and all other 'over-the-top' companies from Internet, privacy, and video regulations that would otherwise apply based on the presumption that over-the-top companies lack the incentive or ability to engage in discriminatory or anticompetitive behavior that could harm consumers or competition. Netflix just proved that presumption is dead wrong."

Scott Cleland, president of Precursor LLC and chairman of Netcompetition, a broadband company-backed e-forum, said the revelation could have wide implications.

"For the last several years that Netflix has relished the role of Grand Net Neutrality Inquisitor accusing ISPs of throttling Internet traffic in alleged violation of net neutrality, Netflix actually has been secretly throttling its Internet-leading traffic in ways that it never disclosed to either its users, the public, or to the FCC/FTC," he said.

"This incredible net neutrality revelation could have lots more repercussions than many appreciate at first glance." To check out Cleland's second glance, [click here](#).

Doug Brake, telecom policy analyst at the Information Technology and Innovation Foundation, suggested it was no harm, no foul on Netflix's part, but that means ISPs should not be in the net neutrality doghouse for managing their traffic.

"First of all, this is pretty clearly not a violation of the net neutrality as currently implemented by the Federal Communications Commission (FCC)," [he blogged Friday](#). Nor should it be a violation of any rules. These are Netflix's video streams, and it should be able to manage its data however it thinks will best please its customers. But what is good for the Netflix goose should be good for the gander: If Netflix is free to manage its traffic to better serve consumers, Internet Service Providers (ISPs), who are in an even better position to understand the traffic patterns and dynamics at play within the network itself, should be able to do the same. Same customers, same practice, same good outcome, but as it stands today, only one is unlawful."

Matt Wood, policy director for Free Press did not see it as a net neutrality violation either, but wasn't suggesting that got ISPs off the hook.

"The bottom line for me is that net neutrality prevents carriers from dictating what we say to each other. It doesn't dictate what we say to each other ['we' including Netflix as a speaker]," he told B&C/Multichannel News. "Netflix is free to transmit its content however it wants. If users want to leave that behind because they don't like that, that's fine. I'm not here to defend anything Netflix is doing, but you can't shoehorn this into net neutrality because it is not about the carrier in the middle interfering with content."



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Updated: Netflix Gets Hammered Over 'Throttling' - Multichannel

"Netflix suggests it was doing this to spare wireless users from burning through their carrier-imposed data caps. That's not a bad idea, but it's still off-putting. If Netflix was limiting transmission speeds and picture quality for its users without telling them, as appears all too likely, that's a bad thing. Period, full stop. Companies should be transparent with their customers and empower them to make their own choices."

Wood followed up with more input in a blog post:

"News broke Thursday that Netflix has been throttling video streams for its own customers when they're watching on mobile devices and networks....Netflix responded with its own post, staying away from the term "throttling" but revealing that its "default bitrate for viewing over mobile networks has been capped globally at 600 kilobits per second."

"Is that a good thing for Netflix users? Maybe, maybe not. But whatever it is, it's *not* a Net Neutrality violation. Plain and simple. Anyone who tells you that it is — or that this practice undermines the case for Net Neutrality rules — is either in the business of misleading you, woefully ignorant of the law, or both.

"Sadly, that is correct," said Seton Motley, president of Less Government in response to the Free Press analysis. "Because the FCC's huge power grab - doesn't apply to 'edge providers' like Netflix. Only ISPs are subject to this heinous onerousness: "ISPs could receive a hefty fine under the net neutrality rules for similar practices, but Netflix faces no such danger, at least not for the throttling itself. The net neutrality rules only apply to ISPs..., not to companies...like Netflix or Google Inc."

How's that for un-equal protection before the law? Except this isn't law - it's agency regulatory fiat," said Motley. "We're already WAY off the Constitutional map - here there be monsters."

While Wheeler did not comment, he has said before when asked about what seem questionable practices by edge providers that, unlike ISPs, Web surfers have choice among Web sites, but generally not among ISPs.

March 12, 2019

Congressman Michael Doyle  
Chairman, Communications & Technology Subcommittee  
House Energy & Commerce Committee  
2125 Rayburn House Office Building  
Washington, DC 20515

**TECH  
FREEDOM**

Congressman Robert E. Latta  
Ranking Member, Communications & Technology Subcommittee  
House Energy & Commerce Committee  
2125 Rayburn House Office Building  
Washington, DC 20515

**RE: Legislating to Safeguard the Free and Open Internet**

Dear Chairman Doyle and Ranking Member Latta:

The “Save the Internet Act of 2019” (H.R. 1644) purports to accomplish three things:

1. “Repeal” the FCC’s 2017 Restoring Internet Freedom Order (RIFO)<sup>1</sup> (which reversed the 2015 Open Internet Order);<sup>2</sup>
2. “Prohibit” the FCC from reissuing the RIFO or anything like it; and
3. “Restore” the 2015 Order and the Open Internet regulations issued thereunder in the Code of Federal Regulations (Part 8, Title 47).

At the press conference launching H.R. 1644, sponsors of the bill had diametrically opposed views of whether the bill would forbid or mandate regulation of broadband prices — something that Title II allows, but which has nothing to do with net neutrality. The fact that they could disagree on something so fundamental illustrates a more fundamental problem with H.R. 1644: its sponsors claim they are merely reviving the 2015 Order, but that just can’t be done with a one-page bill. Instead, more detailed legislation would need to be enacted.

<sup>1</sup> *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report, and Order, FCC 17-166 (Jan. 4, 2018) [hereinafter *RIFO*], [https://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2018/db0104/FCC-17-166A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0104/FCC-17-166A1.pdf).

<sup>2</sup> See *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5803 ¶ 431 (2015) [hereinafter *Open Internet Order*], [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-24A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf).

Specifically, to do what the bill's sponsors want, legislation would have to:

1. Do one of two things:
  - a. Codify Broadband as a Title II service — instead of merely declaring the 2015 Open Internet Order “restored” and explicitly decide which Title II powers Congress was denying to the FCC, rather than just assuming the 2015 Order’s forbearance decisions would be granted,
  - b. OR write a new Title of the Communications Act, an idea Sen. Bill Nelson dubbed “Title X,” that included only the concepts of Title II that the FCC is supposed to be left with
2. Codify net neutrality rules directly into legislation — instead of merely declaring a section of the Code of Federal Regulations to be revived, which doesn’t actually put them into the U.S. Code or give them the weight that statutes get.

To do what Democrats *think* they’re doing, a third thing would be required: the FCC would also have to clearly supersede the 2017 resolution of disapproval enacted under the Congressional Review Act (CRA) by Congressional Republicans,<sup>3</sup> which barred the FCC from issuing any new rule that is substantially similar to the Broadband Privacy Order issued by the FCC at the very end of the Obama Administration.<sup>4</sup> Otherwise, even if broadband were clearly declared to be a Title II service, the FCC would be unable to issue broadband privacy rules, and the Federal Trade Commission would again lose jurisdiction over broadband.

We explain each of these problems in turn below. While the third problem could probably be fixed easily, we suspect that doing so would defeat the real purpose of this bill: to allow Congressional Democrats to present a bill that at least seems to resemble the CRA resolution of disapproval concerning the 2017 RIFO, for which three Republican Senators voted. Complicating H.R. 1644, even slightly, would defeat what seems to be the bill’s primary purpose: not to resolve the issue of net neutrality, but to allow Congressional Democrats to put Congressional Republicans in a political bind.

However, the first two problems cannot be fixed. For this reason, if H.R. 1644’s sponsors are serious about “protecting net neutrality,” they will need to start over with an entirely new bill — something TechFreedom has called for since 2014.

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<sup>3</sup> See S.J.Res 34, 115th Cong. (2017).

<sup>4</sup> Report and Order, *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (Nov. 2, 2016), available at <https://goo.gl/iAwro0>.

### I. Why the CRA Couldn't Restore Title II and H.R. 1644 Can't Either

H.R. 1644 is crafted to mirror the previous House Congressional Review Act (CRA) Resolution,<sup>5</sup> which never came to a vote in the House, and by statute, died with the end of the last Congress. By the clear terms of the CRA statute, a CRA can only be exercised in the same Congress as when the rules are first presented to Congress. Thus, this bill cannot be moved through the legislative process using the expedited procedures of the CRA, such as the use of a discharge petition to force a vote in the Senate with a bare majority of Senators.

#### A. How the CRA Works Generally

Last year, TechFreedom explained at length why the CRA resolution wouldn't have done what Democrats claimed in a letter to Congressional leadership, which we attach hereto as **Appendix A**.<sup>6</sup> Also attached, as **Appendix B**, is our analysis of Harold Feld's response to our letter.<sup>7</sup> In summary, the CRA can only block "rules," which regulatory agencies issue as delegations of the *legislative* function delegated by Congress. It cannot be used to reverse adjudicatory orders, which are quasi-judicial in nature. This is not merely a limitation upon the CRA that could be bypassed in legislation taken outside the scope of the CRA: it is a reflection of the separation of legislative and judicial powers, a constitutional limitation that applies to this legislation just as it does to the CRA.

There is a staggering irony lurking behind Democrats' confusion over what is and isn't subject to the CRA. If H.R. 1644 could, simply by saying so, reverse the RIFO, the same must be true of the CRA — that under both, such legal reinterpretations would be "rules." (As discussed below, the Save the Internet Act would preclude the FCC from reissuing any "rule" similar to the RIFO.) But if this is true, it means that any such legal reinterpretation by an agency since 1996 never actually went into effect unless it was submitted to Congress in the report required by the CRA for all "rules" — like rulemakings. If not, this would undermine the legal basis for much of administrative law in the last 23 years.

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<sup>5</sup> See H.R.J. Res. 129, 115th Cong. (2018) (unenacted); See also S.J. Res. 48, 115th Cong. (2018) (unenacted).

<sup>6</sup> See generally TechFreedom, Congressional Letter, *In the Matter of Notice of Proposed Rulemaking Restoring Internet Freedom*, (May 14, 2018), [http://docs.techfreedom.org/Letter\\_Net\\_Neutrality\\_CRA\\_Legal\\_Analysis\\_May\\_2018.pdf](http://docs.techfreedom.org/Letter_Net_Neutrality_CRA_Legal_Analysis_May_2018.pdf).

<sup>7</sup> See generally Berin Szóka, *What Harold Feld Doesn't Get About the CRA*, Tech Policy Corner (May 16, 2018), <https://techpolicycorner.org/what-harold-feld-doesnt-get-about-the-cra-bd4ed32ce62b?gi=3b64f8ced0df>.

In fact, Congressional Democrats protested loudly when Republicans used the CRA to override longstanding *de facto* rules contained in 2013 guidelines issued by the Consumer Financial Protection Bureau.<sup>8</sup> These were subject to challenge under the CRA, despite their age, because they were never submitted to Congress under the CRA, because the agency insisted at the time that they were merely guidelines, rather than rules requiring a rulemaking.<sup>9</sup> But the General Accountability Office (GAO) — an independent, non-partisan office — later concluded that the 2013 guidelines constituted “a general statement of policy and a rule under the CRA.”<sup>10</sup> Rep. Maxine Waters (D-Calif.), Ranking Member of the House Financial Services Committee, called this “an inappropriate and misguided use of the Congressional Review Act that sets a dangerous precedent” — even though the CFPB guidelines clearly constituted a rule.

Now imagine the outrage Democrats would feel if Republicans attempted to claim that every legal reinterpretation made by an agency since 1996 was a “rule.” Fortunately, this is simply not how the CRA works — and, presumably, Congressional Democrats would rush to say so in such a situation, despite making exactly the opposite argument in this context.

### **B. What the 2017 CRA Would Actually Have Done — and Not Done**

The FCC’s 2015 Order contained two parts:

1. **Order:** The underlying interpretation of Title II and Section 706 as granting the FCC the power to impose the Open Internet Rules on broadband services.
2. **Rule:** Issuance of the Open Internet Rules contained in Appendix A to the order, later codified in Part 8 of Title 47 of the Code of Federal Regulations; and

Similarly, the 2017 RIFO contained two parts:

1. **Order:** Reinterpretation of Title II and Section 706 that removed any legal basis for any other rules; and
2. **Rule:** Repeal of most of the 2015 rules, but reissuance of the transparency rule, with modifications.

<sup>8</sup> See Zachary Warmbrodt, *House votes to kill CFPB auto-lending guidelines*, Politico (May 8, 2018), <https://www.politico.com/story/2018/05/08/auto-lending-guidelines-consumers-house-521847>.

<sup>9</sup> See Zachary Warmbrodt, *GOP maneuver could roll back decades of regulations*, Politico (April 17, 2018), <https://www.politico.com/story/2018/04/17/congressional-review-act-fallout-485426>.

<sup>10</sup> U.S. Gov’t Accountability Off., B-329129, Bureau of Consumer Financial Protection: Applicability of the Congressional Review Act to Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act at 1 (2017) (letter to Sen. Patrick Toomey from G.A.O. General Counsel Thomas Armstrong) (available at <https://www.gao.gov/assets/690/688763.pdf>).

If, as we argue in the appendices, Congress can always reverse a rule (issued upon the delegation of Congress's legislative power) but cannot supersede agency's adjudicatory orders — *except to the extent that it could do so by passing new, specific legislation* — consider the perverse consequences of what H.R. 1644 would — and would not — do.

First, like last year's CRA, H.R. 1644 would void only that part of the 2017 RIFO that constitutes a rule — the reissuance of the transparency rule. Why would that not also void the RIFO's repeal of the other 2015 rules? Because the rulemaking aspect of repealing those rules was essentially a formality, a mere deletion of the rules from the Code of Federal Regulations: what really eliminated the rules was the FCC's holding — *in an order* — that it lacked authority for the issuance of those rules under either Title II or Section 706.

Second, the 2017 CRA would have had no effect on application of Title II or Section 706. Thus, the practical effect of the 2017 CRA resolution would have been worse than null: It couldn't have undone the FCC's re-interpretation of Title II and Section 706, so the FCC still would have lacked the power to issue (or enforce) the Open Internet Rules (fortunately, the FTC would have retained full power over what remained non-common-carrier services). In other words, the FCC would have been left with *no rules at all*.

### C. The Retroactivity Red Herring

This is a complicated legal issue — one made even more by a footnote in the 2017 Order. One of the essential differences between (legislative) rules and (adjudicatory) orders is that rules can only ever have prospective effect, while orders can retrospective as well as prospective. The footnote in question (not addressed in our attached appendices) says:

our classification decision arises from our reconsideration of past interpretations and applications of the Act. We thus conclude that the classification decisions in this Order appropriately apply only on a prospective basis. See, e.g., *Verizon v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001) (“In a case in which there is a substitution of new law for old law that was reasonably clear, a decision to deny retroactive effect is uncontroversial.”) (internal quotations omitted).<sup>11</sup>

One might argue that the FCC's statement that re-interpretation of Title II would only be forward-looking means that the FCC thought it was a rule, but the fact that the FCC even had to specify whether the interpretation would be retrospective proves that the FCC thought it had a choice, and that it decided not to claim retroactive effect. The 2001 case cited by the RIFO in the footnote quoted above further illustrates the adjudicatory nature of orders such as

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<sup>11</sup> *RIFO* note 792.

those underlying the RIFO. Here is the passage that precedes the quote used in the FCC's footnote:

This is not to say that agency adjudications that modify or repeal rules established in earlier adjudications may always and without limitation be given retroactive effect. To the contrary, there is a robust doctrinal mechanism for alleviating the hardships that may befall regulated parties who rely on "quasi-judicial" determinations that are altered by subsequent agency action. Over fifty years ago, in *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947), the Supreme Court cautioned that the ill effects of retroactivity "must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles."

In the ensuing years, in considering whether to give retroactive application to a new rule, the courts have held that

[t]he governing principle is that when there is a "substitution of new law for old law that was reasonably clear," the new rule may justifiably be given prospectively-only effect in order to "protect the settled expectations of those who had relied on the preexisting rule." *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993). By contrast, retroactive effect is appropriate for "new applications of [existing] law, clarifications, and additions." *Id.*

*Pub. Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996) ("PSCC"). See also *Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1152 (D.C. Cir. 1986) (discussing the distinction between "new applications of law" and "substitutions of new law for old law"). In a case in which there is a "substitution of new law for old law that was reasonably clear," a decision to deny retroactive effect is uncontroversial. *Epilepsy Found. of N.E. Ohio v. NLRB*, 268 F.3d 1095, slip op. at 12-13 (D.C. Cir. 2001).<sup>12</sup>

#### **D. H.R. 1644's Attempt to Preclude Further FCC Rules**

Since this bill is designed to look as much as possible like the CRA (for the political reasons explained above), it is not an accident that it mirrors the CRA's preclusion provision:

Prohibition on Reissued Rule or New Rule.—The Commission may not reissue the Declaratory Ruling, Report and Order, and Order described in subsection (b) in substantially the same form, or issue a new rule that is substantially the same as

<sup>12</sup> *Verizon Telephone Companies v. F.C.C.*, 269 F.3d 1098, 1109-10 (D.C. Cir. 2001).

that Declaratory Ruling, Report and Order, and Order, unless the reissued or new rule is specifically authorized by a law enacted after the date of enactment of this Act.<sup>13</sup>

This is clearly intended to bar the FCC from simply reissuing the RIFO. However, it will fail, for the same reasons the 2017 CRA would have failed: neither can stop the FCC from exercising its quasi-judicial powers via new declaratory orders. The only thing this provision would do is, like the 2017 CRA, bar the FCC from reissuing a transparency rule that is “substantially similar” to that reissued in the RIFO.

## II. Broadband Privacy

Perhaps the most striking thing about the Save the Internet Act is what it doesn’t do: mention broadband privacy. Rewind to early 2017. Congressional Republicans seized on the CRA as a weapon for undoing “midnight regulations” issued by President Obama’s agencies. (Whatever you think of the CRA or those particular regulations, this is exactly the scenario envisioned by the authors of the CRA when the law passed in 1994). Among the CRA resolutions that passed was one reversing the order passed by the FCC in late 2016 to create a bespoke privacy regulatory framework for ISPs completely different from how their collection and use of user data had been regulated by the Federal Trade Commission prior to the FCC’s 2015 Open Internet Order.

The Obama-era FCC had argued, rightly, that it had to do *something* about broadband privacy because the OIO took away the FTC’s jurisdiction when it declared Broadband Internet Access Service (BIAS) to be a Title II common carrier service, which is excluded from the FTC’s otherwise-general consumer protection jurisdiction. As we argued at the time,<sup>14</sup> the FCC could simply have applied its own consumer protection powers under Section 201(b) case-by-case to mirror the FTC’s approach, ensuring that net neutrality regulation would only have changed which agency dealt with broadband privacy, not the underlying standards. (Remember, the FCC’s 2015 order supposedly had nothing to do with privacy). But Democrats (both on the FCC and in Congress) howled, insisting that consumers would be completely unprotected without specific rules on the books (just as they claimed the FTC couldn’t police net neutrality case-by-case, as if the only way to “regulate” was to have a specific rule in the Code of Federal Regulations).

<sup>13</sup> See A Bill to Restore the Federal Communications Commission’s Open Internet Order and Its Net Neutrality Protections, S.682, 116th Cong. (2019).

<sup>14</sup> See generally Reply Comments of TechFreedom and CEI, *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106 (July 6, 2016), available at [https://cei.org/sites/default/files/tf\\_cei\\_reply\\_comments\\_fcc\\_privacy\\_nprm\\_7.6.2016.pdf](https://cei.org/sites/default/files/tf_cei_reply_comments_fcc_privacy_nprm_7.6.2016.pdf).



It was a silly argument (other than the quite valid point that the Fair Notice Doctrine, grounded in constitutional due process principles, allows civil penalties to be imposed only where clear guidance is provided to regulated parties). But if Democrats meant it then, it's astounding that the Save the Internet Act doesn't say a word about privacy. If Congress really could raise regulatory orders from the dead, why not revive the 2016 Broadband Privacy Order too — or at least break the “spell” by which Congress barred the FCC from ever reviving that order?

The most obvious answer is political: adding authority over privacy rules to this bill (along with the required clear statutory language that BIAS and other aspects of the Internet are subject to Title II regulation) would complicate the simple “we’re just reviving the 2015 Order” narrative, and alert the three Senate Republicans who supported the CRA to what is really going on — granting the FCC unbridled authority to set prices and adopt privacy rules, something Republicans have rightfully resisted for a decade.

### **III. This Bill Raises Constitutional Problems the CRA Doesn't**

One might remain unconvinced by our analysis of what the CRA can and cannot do. It hardly matters, because the Save the Internet Act raises constitutional problems that the CRA doesn't. The CRA involves Congress blocking a regulatory action taken under authority issued by Congress. It can get messy if applied to orders, rather than rules, but when applied to rules, the CRA is relatively straightforward: the rules issued by the agency are void and the agency can't reissue them.

But the Save the Internet Act goes far beyond that. Instead of merely killing rules, it attempts to revive defunct rules and turn them into legislation. It's not hard to see how problematic this is. It's one thing to say Congress should “revive the 2015 Order” but simply passing a bill that actually says that and only that is completely unlike what Congress always does when it legislates: passing a single sentence referencing a 300+ page order instead of enacting specific language that can be codified in the United States Code.

We're not aware of any precedent for doing what H.R. 1644 would do — “legislating” without resulting in specific, codifiable statutory outputs. It's totally unclear how the FCC or the courts could implement and interpret this legislative approach. This approach is begging for a lawsuit arguing that, while Congress has plenary legislative powers, it has to actually pass *legislation*, not vague attempts to incorporate by reference some sprawling document issued by an agency.

Whatever would happen to such a legal challenge, one thing is likely: there wouldn't be a statute that the FCC could later claim to be interpreting when challenged in court on the application of its authority. Without that, the FCC wouldn't enjoy the kind of deference agencies normally get under the Supreme Court's *Chevron* decision. That would make it considerably harder for the FCC to enforce its rules — something no Democrat could actually want.

#### IV. Forbearance

The sponsors of the Save the Internet Act seem to disagree on whether their bill would bar, allow, or mandate broadband price regulation by the FCC — exactly the kind of confusion that comes with enacting something that isn't really legislation, and therefore lacks the clarity of laying out clearly what the FCC can and can't do.

Recall that the 2015 Order purported to “tailor” or “modernize” Title II by forbearing from nearly all of its provisions, leaving in place “only” the core powers the FCC needed to justify its rules. Tom Wheeler, the FCC Chairman at the time, insisted that this would avoid the potential for the FCC to regulate broadband prices, angrily attacking those who suggested otherwise. The potential for price regulation, and its effects on investment and innovation, has always been the primary concern about Title II.

Last week, Rep. Yvette Clark (D-NY), insisted that the Save the Internet Act would, by locking in the 2015 Order, also lock in the Order's forbearance — and thus protect against FCC overreach. This is consistent with the Congressional Black Caucus's reasons for opposing Title II when the idea was first floated in 2010, worrying that any reduction in investment would hurt minority communities most.<sup>15</sup> But House Speaker Nancy Pelosi and Senate Minority Leader Chuck Schumer said the exact opposite: that consumers needed the FCC to regulate broadband prices, and their bill would allow them to do just that.

If the Save The Internet Act bill does allow the FCC to change the various forbearance pronouncements contained in the 2015 Order, which ones are subject to change? Could the FCC go farther, and forbear even further, all the way up to forbearing enforcement on any of the provisions of the 2015 Order? Or does the bill only allow the FCC to remove forbearance and apply more regulation to the Internet?

The fact that the core of the bill's sponsors can't agree on these bedrock concepts tells you why this approach to legislation is such a profoundly bad idea.

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<sup>15</sup> Cf. House Democrats, Congressional Letter to FCC Chairman Genachowski, (May 24, 2010), [https://web.archive.org/web/20110823032512/http://netcompetition.org/House\\_Democrat\\_Letter.pdf](https://web.archive.org/web/20110823032512/http://netcompetition.org/House_Democrat_Letter.pdf).

Whether a grant of forbearance is an adjudicatory decision was at issue in the legal challenges to the 2015 Order.<sup>16</sup> If it is, it is simply not subject to the CRA or to any other Congressional action that attempts to, like the CRA, strike down an agency order and preclude the agency from re-issuing it — for all the same reasons as above.

Regardless, this is really another red herring. Whether the FCC could undo the forbearance contained in the 2015 order, or whether that order is revised, the important fact remains this: the 2015 Order did *not* forbear from the core provisions of the Act, Sections 201(b) and 202(a) — which have always been the basis for the FCC's price regulation, and were basis for common carriage regulation under the Interstate Commerce Act of 1887.<sup>17</sup>

## V. The Path Forward: Actual Substantive Legislation

Democrats have proposed *real* net neutrality legislation before. In 2010, FCC Chairman Julius Genachowski supported a legislative solution, and Henry Waxman, then chairman of the influential Government Oversight Committee, tried hard to get Republicans on board. Republicans blew the opportunity, dragging their feet in hopes of picking up seats in the midterm elections. They did, but by then, it was too late: the FCC had already issued its first Open Internet Order. Senator Maria Cantwell (D-WA) introduced a bill<sup>18</sup> derived from the Waxman bill in 2011, but since then, Democrats have simply moved from one excuse to the next *not* to introduce real legislation: waiting for the D.C. Circuit's 2014 *Verizon* decision (striking down the 2010 Order), then "letting the FCC work," then "letting the legal challenges play out in Court," then the CRA... and now this bill, which is effectively a rehash of the CRA fight.

In the meantime, Republicans have proposed legislation *four times* — each taking the Waxman bill or the 2015 Order as its starting point. Each of these bills has been attacked as "fake net neutrality" by Democrats. Yet it's the Republican bills that are actually serious about doing what the Democrats say they want: codifying the 2015 Order — with one big exception. Republicans have always objected to giving the FCC broad latitude to regulate Internet services as common carriers, because that could include things like price controls or anything else the FCC might dream up. Other than potential constitutional challenges, there's really no statutory limit to what the FCC could do with the Title II powers it claimed in 2015, not

<sup>16</sup> *Verizon & AT&T, Inc. v. FCC*, 770 F.3d 961, 966 (D.C. Cir. 2014) ("At oral argument, petitioners asserted that when the Commission determines whether to grant forbearance under section 10 it is engaged, under the APA, in an adjudication rather than a rulemaking.").

<sup>17</sup> See Comments of TechFreedom, *Notice of Proposed Rulemaking - Restoring Internet Freedom*, WC Docket No. 17-108, at 51-53 (Aug. 30, 2017), [http://docs.techfreedom.org/TechFreedom\\_Reply\\_Comments\\_on\\_Open\\_Internet\\_Order.pdf](http://docs.techfreedom.org/TechFreedom_Reply_Comments_on_Open_Internet_Order.pdf).

<sup>18</sup> Internet Freedom, Broadband Promotion, and Consumer Protection Act, S.74, 112th Cong. (2011).

only over broadband but also other services that use IP addresses. And the FCC's 2010 claim that Section 706 is a free-standing grant of authority gave the FCC a separate, open-ended grant of power to do almost anything that falls short of common carriage regulation over not just broadband but *any* form of "communications."

As we've been saying since 2014, the contours of a legislative deal here are obvious: give the FCC the legal authority it needs to police net neutrality complaints so that the agency doesn't need to claim broader powers. That leaves some thorny questions to be resolved, most notably what kind of "general conduct standard" will govern cases that aren't covered by the bright-line rules (which everyone agrees on). But as long as that standard doesn't leave the barn door open for the FCC to claim the kind of powers conferred by Title II, a compromise should be relatively easy to hammer out.

\* \* \*

We stand ready and willing to assist your committee with the drafting of legislation to resolve this issue so Congress can protect consumers while resolving lingering uncertainty over the authority of the FCC to regulate Internet services.

Sincerely,

Berin Szóka & James Dunstan<sup>19</sup>

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<sup>19</sup> Berin Szóka is President of TechFreedom, a nonprofit, *nonpartisan* technology policy think tank. He can be reached at [bszoka@techfreedom.org](mailto:bszoka@techfreedom.org). James Dunstan is General Counsel of TechFreedom. He can be reached at [jdunstan@techfreedom.org](mailto:jdunstan@techfreedom.org). This document could not have been completed without the assistance of Caden Rosenbaum, Legal Extern at TechFreedom and a law student at American University Washington College of Law.

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**Attachment—Additional Questions for the Record**  
**Subcommittee on Communications and Technology**  
**Hearing on**  
**“Legislating to Safeguard the Free and Open Internet”**  
**March 12, 2019**

Mr. Gregory Green, Chief Executive Officer, Fatbeam

**The Honorable Greg Walden (R-OR)**

**1. Thank you for your testimony recently at the House Energy & Commerce Committee. I wanted to follow up on my question regarding the challenges of providing rural broadband service. Your answer, according to the transcript, is “less than 12 percent” of your service is residential versus ‘business-to-business’.**

**a. Can you please elaborate on the residential service you offer?**

**Response:** Fatbeam provides both retail and wholesale internet access service. Fatbeam currently provides retail internet access service to 3 Multi-Dwelling Units (“MDU”). The owner of each MDU is Fatbeam’s customer, and each MDU tenant has access to the service, which is the MDU’s customer. Fatbeam also has wholesale customers who offer residential service. Fatbeam does not have access to the number of residential customers served for these providers.

- **What is the residential consumer product that you are offering (i.e. fixed wireless, fiber-to-the-home)?**

**Response:** Fatbeam offers its internet access service over fiber.

- **Where is this product being offered?**

**Response:** Washington and Idaho.

- **What percentage of growth are you experiencing in residential customers versus commercial customers in 2019 and 2020?**

**Response:** Fatbeam has added no new MDU or wholesale customers in 2019, and Fatbeam has no current marketing push targeting new MDU or wholesale ISPs. Therefore, we have no projected growth numbers at this time.

**b. You testified in support of the “Save the Internet Act.” I wanted to follow up on your role in installing broadband connections for school districts, so I assume your business works with the e-rate program.**

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- **Are you aware that the bill purports to permanently put in limitations on USF, the fund from which e-rate receives its funding?**

**Response:** As my written testimony stated, Fatbeam has an especially strong history with network provisioning for school districts through the E-rate program. Over the last three years, Fatbeam has partnered to deliver newly constructed fiber-optic networks for schools. The resulting fiber optic networks have afforded school districts access to nearly ten times their previous bandwidth and has resulted in a decrease in cost per megabyte of more than 20%, saving taxpayers (and the E-rate program) money.

As I understand it, the Save the Internet Act proposes to reinstate the FCC's 2015 Open Internet Order. While that Order was in effect, Fatbeam continued to deploy fiber, adding eight new cities to our footprint. As I stated in my testimony, neither the 2015 Order and rules nor FCC oversight deterred our investment. Similarly, our participation in bidding for E-rate projects was not impacted; and to my knowledge, there was no impact on E-rate funding as a result of the FCC's 2015 Open Internet Order. Accordingly, there is no indication that the Save the Internet Act would impact that funding.

- **Given the bill freezes this program in place via purportedly codifying forbearance, are you okay with applying stricter conditions on the e-rate program so as to make sure scarce dollars go farther, such as a ban on overbuilding existing providers with Federal dollars?**

**Response:** The E-rate program as currently managed by the FCC already has an annual cap, and FCC rules require that schools and libraries participating in the E-rate program competitively bid for their services to drive more efficiency in the program. Fatbeam competes for the school districts' business against other companies. Fatbeam's success in bidding to serve schools is (in part) because of the higher bids of incumbent companies. The result has been that the school districts obtain much greater bandwidth for less investment—saving the school districts money (i.e., the local taxpayers) as well as the E-rate program (i.e., telecommunications consumers who pay into the USF). Any restrictions on the competitive bidding process will only harm the effectiveness of the program which is driving greater bandwidth for less money.

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**Attachment—Additional Questions for the Record**

**Subcommittee on Communications and Technology  
Hearing on  
“Legislating to Safeguard the Free and Open Internet”  
March 12, 2019**

Mr. Robert M. McDowell, Senior Fellow, Hudson Institute; and Partner, Cooley LLP

**The Honorable Anna G. Eshoo (D-CA)**

**1. You have had a distinguished career when it comes to communications policy. I’ve always had a great deal of respect for you, even when we disagree, as we do on this issue. In 2014, you invited me to speak about this issue at an event. At the time, I said publicly that we’ve spent too long debating this—that was in 2014. Well, here we are, half a decade later, still working on it.**

**In your testimony, you point out that Title II is too heavy-handed for the internet. However, the FCC’s 2015 Order forbore from 27 of 43 statutory provisions of Title II and over 700 association regulations, including forbearance from what many see as the utility-style and heavy-handed regulations that the Communications Act includes. Since H.R. 1644 codified this forbearance, what exactly is heavy-handed in this framework?**

**Response:** Congresswoman Eshoo, thank you for this question. I have always enjoyed working with you and our constructive conversations. Sometimes we respectfully disagree but, at other times, we surprise observers when we do agree, which is more often than some realize. Indeed, you and I agree on the importance of being “cautious about heavy-handed regulation” and applying the full force of Title II to broadband service.<sup>1</sup> And, as you noted, there is no doubt that we’ve spent too long debating Internet network management regulations, or “network neutrality,” without reaching a lasting bipartisan consensus.

As I said in my testimony, the approach the FCC adopted prior to issuing its first set of “open Internet” regulations was enormously successful. Light-touch regulation under Title I and other federal statutes<sup>2</sup> provided the certainty and stability that has led to the investment of more than \$1.6 trillion in broadband infrastructure since the mid-1990s and, equally important, allowed the Internet’s “edge” to flourish. By any measure, light-touch regulation was a boon to service providers, content providers, and consumers alike, and made America’s Internet ecosystem the envy of the world.

<sup>1</sup> John Eggerton, Eshoo: FCC Can Find Title II-Lite Solution, Multichannel News (Mar. 28, 2018) at <https://www.multichannel.com/news/eshoo-fcc-can-find-title-ii-lite-solution-383720> (last reviewed May 7, 2019).

<sup>2</sup> 15 U.S.C. § 15 (Clayton Act), 15 U.S.C. § 1 (Sherman Act), 15 U.S.C. §§ 41-58 (FTC Act).

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That said, for the last decade that same Internet ecosphere has endured an environment of constantly changing rules. Frequent changes have had an effect on investment in broadband that cannot be ignored. In contrast, America's Internet economy could benefit from constructive, clear and understandable light-touch rules. If there are to be permanent regulations (I maintain that no new rules are needed, however), rather than adopting the onerous requirements of the FCC's 2015 order, the best place to start would be the principles laid out by FCC Chairman Michael Powell in 2005, which largely were endorsed by Chairman Julius Genachowski in 2010: no anticompetitive throttling, blocking or prioritization.<sup>3</sup>

Although, as you note, H.R. 1644 would impose some limits on the FCC's common carrier authority over broadband service, there are many areas where the FCC would retain full power and discretion to act. That creates loopholes and a significant potential for the kind of heavy-handed and counterproductive regulation I described in my testimony. Here's how:

- **The “general conduct” rule:** The bill would give the FCC full authority to regulate Internet service providers under a “general conduct” rule. The 2015 order adopted a rule that permitted the FCC to “prohibit, on a case-by-case basis, practices that unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing or of edge providers to access consumers using the Internet.”<sup>4</sup> This rule would give the FCC wide power to reinterpret and expand its “network neutrality” requirements after the fact, which would discourage investment, innovation and experimentation by broadband providers, and would erode the certainty that should be the goal of any legislation. In short, this open-ended grant of authority would swallow any other ostensible limitations put on the FCC by Congress.
- **Internet traffic exchange:** The 2015 order created a mechanism to resolve disputes about the terms for exchanging Internet traffic, but specifically declined to adopt “prescriptive rules,” leaving the substantive requirements for traffic exchange to be decided in the future.<sup>5</sup> This approach would also give the FCC broad powers to apply a wide range of common carrier obligations to broadband providers when they exchange traffic with other broadband providers, CDNs, and content providers, and invite the FCC to regulate the prices for traffic exchange. This would create a new regulatory regime for peering and potentially the connectivity needed for cloud computing, creating an uncertainty that comes from regulatory overhang.
- **Section 201:** The 2015 order specifically declined to forbear from applying Section 201 of the Communications Act, which requires carriers to furnish service “upon reasonable request” and to offer their service on “just and reasonable” terms and conditions.<sup>6</sup> Although the order did forbear from applying existing rate regulations under Section 201

<sup>3</sup> See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al., *Policy Statement*, 20 FCC Rcd 14986 (2005) (setting open Internet principles); Preserving the Open Internet, *Report and Order*, 25 FCC Rcd 17905 (2010) (adopting rules based on 2005 principles).

<sup>4</sup> Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, 5659-60 (2015) (“2015 Open Internet Order”), *aff’d United States Telecom Ass’n v. FCC*, 825 F3d 674 (D.C. Cir. 2016), *reh’g en banc denied*, No. 15-1063, 2017 WL 1541517, at \*1 (D.C. Cir. May 1, 2017), *cert. denied*, Nos. 17-498 et al. (Nov. 5, 2018).

<sup>5</sup> *Id.* at 5692-93.

<sup>6</sup> 47 U.S.C. § 201(a), (b).



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to broadband services and from adopting new rate regulations in the future, it did not forbear from case-by-case review of rates, or from adopting other types of rules under Section 201. Again, the bill's exception swallows the limitations and creates open-ended powers for the FCC to sever any ostensible tethers placed on it by Congress. With the bill, Congress would cosmetically limit powers on the one hand while contradicting those limitations with the other hand by granting unlimited powers that would supersede any alleged limits.

- **Section 202:** Section 202 of the Communications Act prohibits “unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services.”<sup>7</sup> Again, while the FCC did forbear from applying existing rate regulations under Section 202, it did not forbear from case-by-case review of rates or from adopting other Section 202 regulations. Again, the bill's exception creates open-ended powers for the FCC to sever any ostensible tethers placed on it by Congress. With the bill, Congress would cosmetically limit powers on the one hand while contradicting those limitations with the other hand by granting unlimited powers that would supersede any alleged limits.
- **Section 208 and other enforcement and complaint provisions:** The 2015 order did not forbear from any of the provisions of the Communications Act related to enforcement of its rules, through either third party complaints or the FCC's own actions.<sup>8</sup> Again, the bill's exception creates open-ended powers for the FCC to sever any ostensible tethers placed on it by Congress. With the bill, Congress would cosmetically limit powers on the one hand while contradicting those limitations with the other hand by granting unlimited powers that would supersede any alleged limits.
- **Section 222:** Although the FCC did forbear from applying its privacy rules to broadband services, it did not forbear from applying the underlying statutory provision, which left broadband providers to guess how they could comply.<sup>9</sup>
- **Universal service:** The FCC did not forbear from applying the Communications Act's central universal service provisions and implementing rules to broadband service, except for forbearing “from immediate contribution requirements” while the FCC considered what requirements it would apply.<sup>10</sup> This left broadband providers and consumers wondering if and when the FCC would adopt a new “tax” on broadband service.

This is not a comprehensive list of the requirements that the FCC left in place, but it highlights that the FCC intended to regulate broadband providers under a broad common carrier regime. Sections 201 and 202 are the core of the FCC's regulatory authority over common carriers, and the FCC left those obligations largely intact, except for pre-approval of rates, terms and conditions under its tariff rules. Nothing in the 2015 order prohibits the FCC from using its complaint and enforcement process to set limits on rates, to restrict terms and conditions of service, or to otherwise exercise broad powers over how broadband providers do business. In addition, the Electronic Frontier Foundation, which generally supports new “network neutrality”

<sup>7</sup> 47 U.S.C. § 202(a).

<sup>8</sup> 2015 Open Internet Order, 30 FCC Rcd at 5815.

<sup>9</sup> *Id.* at 5821-24.

<sup>10</sup> *Id.* at 5834-37.

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regulations, warned the FCC that the general conduct rule would be “a recipe for overreach and confusion” unless it was narrowed significantly.<sup>11</sup>

In fact, in late 2016, the FCC began examining whether innovative wireless video offerings, like T-Mobile’s Binge On, were prohibited by the 2015 order.<sup>12</sup> Thus, there is every reason to believe that the FCC would use the broad powers it reserved under the 2015 order to extend the reach of its authority over broadband services.

For these reasons, and others, I am concerned that the bill’s alleged “limitations” on the FCC’s power under Title II to regulate broadband Internet access service providers are illusory and that, in fact, the FCC’s authority would be effectively unlimited in this regard. In short, the bill is not a “light touch” bill but, rather, the foundation for a powerful and onerous regulatory regime.

Thank you for this opportunity to respond to your Question for the Record.

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<sup>11</sup> Corynne McSherry, *Dear FCC: Rethink The Vague “General Conduct” Rule*,” Electronic Frontier Foundation (Feb. 24, 2015) at <https://www.eff.org/deeplinks/2015/02/dear-fcc-rethink-those-vague-general-conduct-rules> (last visited May 7, 2019).

<sup>12</sup> Wireless Telecommunication Bureau, *Policy Review of Mobile Broadband Operators’ Sponsored Data Offerings for Zero Rated Content and Services* (Jan. 11, 2017), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0111/DOC-342987A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342987A1.pdf).

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**Attachment—Additional Questions for the Record**

**Subcommittee on Communications and Technology  
Hearing on  
“Legislating to Safeguard the Free and Open Internet”  
March 12, 2019**

Mr. Matthew F. Wood, Vice President of Policy and General Counsel, Free Press Action

**The Honorable Anna G. Eshoo (D-CA)**

**1. In your comprehensive written testimony, you don’t mention Section 230 of the Communications Decency Act (CDA). Some of my colleagues on the other side of the aisle have suggested that net neutrality and updating Section 230 of CDA should be linked. Can you describe why these are separate and distinct issues?**

**Response:** Thank you for the question, Representative Eshoo. You are correct that the issues of Net Neutrality and Section 230 are separate and distinct, and should not be linked. And while my written testimony in March did not mention Section 230 because it is not germane to the scope and effect of the Save the Internet Act, my testimony for the April 2018 subcommittee hearing on “Internet Prioritization” did address the topic briefly.<sup>1</sup> I am happy to elaborate on that answer on the record for this hearing as well.

It is for good reason that lawmakers and the public are asking questions about the power and conduct of internet companies, including the largest social media, advertising, and sales platforms. That is understandable, and frankly overdue, in light of the controversies caused by the harmful and predatory behaviors of Facebook alone – to say nothing of other companies like Google and more that likewise collect private data to monetize user-created content and conversations.

Yet while you rightly note the stray suggestions from some of your colleagues regarding “updates” to Section 230, I am not aware of actual legislative proposals to amend Section 230 in any specific way. Calls to “address” or “consider” Section 230 generally stop there. That’s likely because some lawmakers pointing at Section 230 either do not understand how that statute operates and what it protects, or do not care to know. Nor do they seem to understand that weakening Section 230 would not address the problems they imagine – and could in fact exacerbate them. But it would harm every entity that allows for user comments and engagement online, not just giant platforms.

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<sup>1</sup> See Written Testimony of Matthew F. Wood, Policy Director, Free Press and Free Press Action Fund, “From Core to Edge: Perspective on Internet Prioritization,” before Committee on Energy & Commerce, Subcommittee on Communications & Technology, at 27-31 (Apr. 17, 2018), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Wood-CAT-Hrg-on-From-Core-to-Edge-Perspective-on-Internet-Prioritization-2018-04-17.pdf>.

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As I noted in my April 2018 testimony before addressing the question of so-called “edge provider” conduct, there is perhaps a misperception that Free Press Action and other Net Neutrality supporters are unwilling to regulate those platforms or edge providers generally.

Nothing could be further from the truth. When it comes to their troubling data collection practices and privacy abuses; their pattern of profiting from hate, from racism, and from their own or other parties’ violations of election law and civil rights law; and their impact on journalism revenues and competition, Free Press Action is deeply concerned and proposing real solutions.

That is why, within the last six months alone, we have (1) helped launch the Change the Terms Coalition to combat the spread of hate speech online, including on the largest platforms; (2) proposed taxes on targeted advertising to generate funds for civic-minded journalism; and (3) co-authored model legislation to not only require affirmative consent for internet and telecommunications companies’ collection and use of individuals’ data, but also to prohibit discrimination and misuse of such data in ways that violate longstanding civil rights protections.

Changing Section 230 – in some as-yet-unspecified way – would do nothing to remedy the real problems that these and other sincere policy proposals identify and address.

To assess what changing Section 230 would do, we must first understand what the statute does today. Contrary to misconceptions possibly held by some who talk of reforming that law, it does not apply solely to Silicon Valley giants, nor is it predicated on any requirement of neutrality.

Section 230 provides two different but complementary liability exemptions to any “interactive computer service.” That defined term includes social media platforms and broadband internet access providers alike, as well as any other website or application that “enables computer access by multiple users to a computer server,” then allows third-party “information content providers” to put information on the internet by using that service. *See* 47 U.S.C. § 230(f)(2), (3).

The liability exemptions in the law apply not only to Facebook posts, Google search results, Twitter timelines, and Amazon reviews; but to a broadband provider, for any content accessed through its internet connections; to a website owned by Comcast, AT&T, or Verizon (like MSNBC.com, CNN.com, or Yahoo.com), for any user comments or user-generated material on them; and to a website or app belonging to Fox News, the New York Times, any other news organization, or any other online entity, for user comments or user-generated material on them.

The first liability exemption, appearing in Section 230(c)(1), precludes liability for third-party speech that covered entities actually host or allow to be accessed using their services. It says, in full: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

But the second liability exemption, in Section 230(c)(2)(A), precludes civil liability if such entities choose not to host or allow access to particular third-party speech, and instead take down, remove, or block it. Thus, no interactive computer service may be held liable for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”

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Put even more succinctly, all covered entities enjoy these liability exemptions – both if they allow access to third-party content, and if they choose not to allow it. There is no discrepancy between the application of Section 230 to social media platforms and its application to other sites that host user-generated content, comments, or conversations. And while this is indeed a broad pair of exemptions, removing one or both of them could have dire consequences.

To the extent that concerns about online platforms' content moderation choices are motivated by supposed political bias in that curation process, removing or weakening the first liability exemption in Section 230(c)(1) would actually encourage more blocking and takedowns of speech. The reason for that is quite simple: if a website suddenly could be liable for content generated by third parties, that website's risk-tolerance for such third-party content would drop precipitously. "Block first, ask questions later" would necessarily become the mantra of any site or service used to access third-party content, so that removing this liability exemption would have the opposite effect from what some lawmakers proposing vague changes might intend.

In a misguided attempt to apply Net Neutrality-like provisions to edge providers and prevent alleged (but unproven) political bias, lawmakers who talk of "fixing" Section 230 might choose to tinker instead with the second liability exemption, in Section 230(c)(2)(A). But removing the exemption for such curation (whether removals of allegedly objectionable material are done automatically by algorithms or by humans reviewing third-party content) would not necessarily create any obligation for platforms and websites to carry all user-generated content. Nor should it.

Removing or weakening the exemption in subsection (c)(2)(A) could prevent or discourage any website, application, or other interactive computer service from taking down material that violates its terms of service. And while that might change business models and bottom lines in Silicon Valley, it also would fundamentally alter the rights of all sites that host user-generated content.

Publishers could in theory face civil liability for taking down terroristic, hateful, harassing, or pornographic content that some platforms today may indeed choose to allow, but that many do not. News sites (or any other sites) targeted to specific topics, interests, or demographics could in theory face civil liability for moderating comment sections and removing improper and irrelevant posts, and would likely choose as a result not to allow user-generated content and comments at all. So amending subsection (c)(2)(A) could lead to the same result as amending subsection (c)(1): more blocking, not less.

Yet even in that case, with greater threat of liability for takedowns, we are not aware of any existing legal obligation or proven theory that would affirmatively require websites, applications, and other information services to host any and all content "neutrally." To perhaps give more thought to their proposals than they themselves have, the lawmakers who call for "fixing" Section 230 in this way might also need to contemplate the creation of some additional carriage requirements applicable to some or all online platforms.

In other words, having long opposed Net Neutrality as unnecessary "regulation of the internet," they now propose regulating websites. And having even longer opposed the Fairness Doctrine for broadcasters, they now demand a Fairness Doctrine for Facebook.

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Yet the spectrum scarcity rationale put forward by the *Red Lion* case to support the FCC's broadcast "Fairness Doctrine" – so long disfavored by the Republican party – was never applied to newspapers or other media outlets, even though these outlets wield tremendous power to decide what news stories are covered and which aren't. Websites, applications, and social media platforms also can have tremendous power to shape what their users see – both on the platform itself and off, thanks to referral of traffic to other sites. But even if the largest platforms today have billions of users, there still remain billions of other websites, applications, media outlets, and other sources of information online and off.

Economic, political, and editorial power alone have historically been insufficient in this country to support content restrictions on speakers, editors, or content aggregators such as newspapers. This remains one of the key differences between what the Communications Act defines as a true "information service," on the one hand, and a broadband telecommunications service on the other. An online publisher, aggregator, or forum may have great sway over news, opinion, and public dialogue, but it does not and cannot have the same type of power that broadband providers do to exclude information from any and all sources online. A news story or comment blocked or removed by Facebook likely already is or can be made available to internet users' on one or many other sites that are literally just a click away; but a news story, comment, or entire website blocked by Comcast becomes unavailable to all users accessing the internet through Comcast.

Verizon dangerously argued once in Net Neutrality appellate litigation that "broadband providers possess 'editorial discretion,'" and said that "[j]ust as a newspaper is entitled to decide which content to publish and where, broadband providers may feature some content over others." This is simply not true. Edge providers and other speakers are not the same thing as telecommunications networks. This is why common carriers such as broadband providers (at least when they are properly classified as such by the FCC), have always been subject to reasonable nondiscrimination rules. They typically are not liable for the speech they carry, and they benefit from Section 230 in this regard too. But they are forbidden from blocking speech they disfavor, unlike edge providers and other services that actually do act as speakers or curators. Note that this includes any websites owned and operated by broadband providers' themselves, such as NBC.com or HBO.com. Websites and applications – no matter how large or widely used – simply are not the same thing as telecommunications pathways that transmit all speech rather than choosing what to transmit.

In sum, changing the first relevant liability exemption in Section 230 would encourage more blocking and removal of content by online platforms rather than less, and thus would likely make all entities that currently benefit from that exemption less "neutral" than they presently are. Changing the second liability exemption in Section 230 could potentially make speakers, editors, and curators of third-party speech and information liable for removing content that violates their terms of service and community standards, yet that bad idea alone would not make interactive computer services more neutral either. That questionable result seemingly would require additional, speculative, and heretofore unarticulated changes to the law, imposing on all information services an unprecedented duty of carriage unsupportable under the First Amendment.

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**Attachment—Additional Questions for the Record**

Mr. Matthew F. Wood, Vice President of Policy and General Counsel, Free Press Action

**The Honorable Billy Long (R-MO)**

**1. How many fundraising emails has Free Press and the Free Press Action Fund sent regarding Open Internet legislation and the FCC's various proposals and Orders on Open Internet Rules from February 2014 until the date of the hearing (February 13, 2019)?**

**Response:** Thank you for the questions, Representative Long. We welcome the chance to provide these answers on the scope and scale of our fundraising activities to support our charitable mission and our advocacy work.

As you may know, Free Press is a 501(c)(3) entity and Free Press Action is a 501(c)(4) entity. These entities exist as two separate and autonomous but interrelated organizations. Both organizations are completely independent: We don't take money from business, government or political parties, and we rely on the generosity of public charities, private foundations, and individual donors to fuel our work. That is why, despite the skeptical tenor of the questions posed to me in the hearing and in these questions for the record, we are proud of the fact that so many people choose to support our work with donations in response to our requests.

While some of the precise details and totals responsive to your questions are not available on our website and in the other public filings the organizations make, many of the facts and figures provided here are a matter of public record and freely available on the Free Press website at <https://www.freepress.net/about> and <https://www.freepress.net/about/financials>. We summarize that information here, and – for the sake of brevity – link to rather than attach our full IRS Form 990s and annual reports. Should you find it useful to receive these filings or other publicly available information from us directly, we can provide same.

Having set forth that background information and those general parameters, the answer to your first question is that while we do not precisely track information in the format and manner your inquiries request, we still can provide detailed responses along the lines you suggest.

Beginning in January 2014, through the date of the March 12th hearing, Free Press and Free Press Action combined sent approximately 200 fundraising emails regarding Open Internet legislation, the FCC's various proposals and orders on Open Internet rules, and the appellate litigation stemming from both the 2015 FCC order and its 2017 repeal. As Free Press was a party to both of those appellate cases (as an intervenor defending the 2015 rules, then a petitioner challenging the 2017 repeal), our efforts to promote and defend these longstanding communications rights has been a more or less constant priority in our work (at the FCC, in Congress, and in the courts) during the entire five-year period on which you seek information.

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The vast majority of these emails were sent on behalf of the 501(c)(4) entity, Free Press Action, which typically relies more heavily on individual donations rather than public charity or foundation grants. The vast majority of these initial emails were also followed by what we call "topper" messages, reminding recipients who have not yet donated about the fundraising request.

**2. How much money has both Free Press and the Free Press Action Fund raised from such emails? If this information is available in public reports, such as tax documents, please provide those reports for the same period of time as listed above.**

**Response:** The organizations do not track or report totals raised from specific email solicitations over such a lengthy period of time, and we cannot provide that information now without incurring additional burdens. What we can provide readily is the total raised from all email fundraising efforts over the course of the five-year period from 2014 through 2018, including but not limited to the Open Internet fundraising emails referenced in answer to your first question above.

From 2014 to 2018, Free Press raised \$167,630 from fundraising emails. Free Press Action, during that same time period, raised \$1,413,479 from fundraising emails. As our organizations' IRS Form 990 filings and our annual reports (each linked to below) will indicate, the organizations together raised a total of \$19,729,701 for those same five years. That means our online fundraising efforts accounted for approximately 8 percent of our total support over that five-year period.

Free Press IRS Form 990 for 2018:  
[https://www.freepress.net/sites/default/files/2019-05/fp\\_990\\_public\\_disclosure\\_2018.pdf](https://www.freepress.net/sites/default/files/2019-05/fp_990_public_disclosure_2018.pdf)

Free Press IRS Form 990 for 2017:  
[https://www.freepress.net/sites/default/files/2018-07/free\\_press\\_2017\\_irs\\_form\\_990\\_public\\_disclosure.pdf](https://www.freepress.net/sites/default/files/2018-07/free_press_2017_irs_form_990_public_disclosure.pdf)

Free Press IRS Form 990 for 2016:  
[https://freepress.net/sites/default/files/2018-02/2016\\_free\\_press\\_990\\_public\\_disclosure.pdf](https://freepress.net/sites/default/files/2018-02/2016_free_press_990_public_disclosure.pdf)

Free Press Action IRS Form 990 for 2018:  
[https://www.freepress.net/sites/default/files/2019-05/fpaf\\_990\\_public\\_disclosure\\_2018.pdf](https://www.freepress.net/sites/default/files/2019-05/fpaf_990_public_disclosure_2018.pdf)

Free Press Action IRS Form 990 for 2017:  
[https://www.freepress.net/sites/default/files/2018-07/free\\_press\\_action\\_fund\\_2017\\_irs\\_form\\_990\\_public\\_disclosure.pdf](https://www.freepress.net/sites/default/files/2018-07/free_press_action_fund_2017_irs_form_990_public_disclosure.pdf)

Free Press Action IRS Form 990 for 2016:  
[https://freepress.net/sites/default/files/2018-02/2016\\_free\\_press\\_action\\_fund\\_990\\_public\\_disclosure.pdf](https://freepress.net/sites/default/files/2018-02/2016_free_press_action_fund_990_public_disclosure.pdf)

Free Press/Free Press Action Annual Report for 2018:  
[https://www.freepress.net/2018\\_annual\\_report](https://www.freepress.net/2018_annual_report)



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Free Press/Free Press Action Annual Report for 2017:  
[https://www.freepress.net/2017\\_annual\\_report](https://www.freepress.net/2017_annual_report)

Free Press/Free Press Action Annual Report for 2016:  
[http://www.freepress.net/2016\\_annual\\_report](http://www.freepress.net/2016_annual_report)

Free Press/Free Press Action Annual Report for 2015:  
[http://www.freepress.net/2015\\_annual\\_report](http://www.freepress.net/2015_annual_report)

**3. Is your organization encouraging its supporters to badger Representatives Butterfield, Schrader, and Soto online because these members advocated for bi-partisan Open Internet legislation and implied that H.R. 1644 may need to be amended in order to make the legislation bi-partisan?**

**Response:** It is not possible to answer this compound question without separating it into its component parts. Free Press Action does not “encourage[e] its supporters to badger” any Members of the House, or any other officials or government decision-makers. We do encourage our members to contact their elected representatives, however, in order to make their views known on proposed legislation and other matters, as is their right under the First Amendment.

Neither did we encourage our supporters to contact Representatives Butterfield, Schrader, Soto, or any others because of any suggestion that Open Internet legislation should be “bi-partisan.” Indeed, as I took pains to point out in my written testimony and in my appearance before the subcommittee, there is overwhelming bi-partisan support – among 90% of Democratic voters and 82% of Republican voters, according to one poll – for the 2015 Open Internet rules and legal framework that H.R. 1644 restores.

We did encourage our email list members and other constituents of subcommittee members to contact their representatives in order to oppose what Free Press Action viewed as unnecessary or harmful amendments to H.R. 1644. While we consistently and vocally supported the approach taken by Chairman Doyle in that legislative process, our support for this legislation – and for the overwhelmingly popular and bi-partisan legal framework it reinstates – has nothing to do with the identity of the party controlling the House or introducing the measure.

**4. Is your organization opposed to considering amendments that would make H.R. 1644 bi-partisan?**

**Response:** No. As explained above, H.R. 1644 as introduced and then as passed did garner tremendous support from voters across the political spectrum. It truly is bi-partisan at the outset and at the last. But to the extent your question is meant to probe whether we would have supported amendments offered by Republican or Democratic House Members, our views on any amendments are determined solely by the substance of and need for such legislative proposals, not the political party of the person proposing them.

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For instance, Free Press Action did not oppose the amendment offered on the House Floor by Rep. Latta, adopted by voice vote, and then made part of the bill on passage, which calls for the FCC to produce a list of statutory and regulatory provisions forborne from in the 2015 order. Yet we opposed an amendment offered at the Rules Committee stage by Rep. Horn (though not made in order on the floor) that called for study of imposing access fees on “edge providers” merely for delivering content to broadband customers who already pay their phone and cable companies for broadband service and for the ability to obtain such content.

**5. Does your organization want Congress to enact a permanent legislative Open Internet solution, or would your organization prefer to continue raising funds by creating further divisiveness on this issue?**

**Response:** Free Press Action wants to make permanent people’s longstanding rights, under the Communications Act, to just, reasonable, and nondiscriminatory telecommunications service. We do not believe that these rights could or should wash away simply because today’s telecommunications network provides broadband access to the internet rather than narrowband access to the telephone network alone.

Whether the permanent preservation of those rights comes with a new bill like H.R. 1644 or through the proper interpretation of existing law, we have supported measures to achieve that permanent end – and thought we had achieved just that before FCC Chairman Pai rejected his predecessors’ efforts and upended the successful, innovation-spurring 2015 rules upheld by the DC Circuit Court of Appeals.

As all of our advocacy attests, those rules are not the least bit “divisive.” In fact, perhaps the only place in the country where one can find much of a partisan split on this issue is in the Halls of Congress and certain corridors at the Federal Communications Commission.

While Free Press Action’s independence from political parties and corporate funding means we will quite likely always need to “continue raising funds” in furtherance of our work, we are proud to seek public support for that work by building bridges and recognizing common ground – not by pretending the positions staked out by representatives inside the Beltway alone are what makes a law “bi-partisan” or unifying.